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RECORD, CASE No. 15,268.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 898.

R. S. POWELL, W. H. BARROW, THOMAS BRANCH, ET AL., PLAINTIFFS IN ERROR,

vs.

THE SUPERVISORS OF BRUNSWICK COUNTY, TECHNICALLY CALLED "THE BOARD OF SUPERVISORS," AND THE ATLANTIC AND DANVILLE RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 23, 1893.

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1 VIRGINIA:

Pleas before the supreme court of appeals, held at the State court-house, in the city of Richmond, on Thursday, February 18, 1892.

Be it remembered that heretofore, to wit, on the 17th day of February, 1891, came R. S. Powell, W. H. Barlow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, J. R. Manson, E. R. Johnson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner and filed their petition for an appeal from a decree rendered by the judge of the circuit court of Brunswick county in vacation and admitted to record in the clerk's office of said court on the 1st of March, 1890, in a suit in which the petitioners were plaintiffs and The Supervisors of Brunswick County and The Atlantic and Danville Railway Company were defendants; which petition, with transcript of record filed with same, is as follows:

Petition.

"To the honorable judges of the supreme court of appeals of Virginia:

The petition of R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, J. R. Manson, E. R. Johnson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, resident citizens and tax-payers of the county of Brunswick, Virginia, who sue on behalf of themselves and all other citizens and tax-payers of said county who will make themselves parties to this suit and contribute to the costs of the same, respectfully represents that they are aggrieved by a final decree of the circuit court of Brunswick county, entered on the 26th day of February, 1890, in the vacation of said court, in a certain suit in chancery pending in the said court, the style of which is R. S. Powell *et als. vs.* The Supervisors of Brunswick County and The Atlantic and Danville Railway Company, in which your petitioners were plaintiffs and the said supervisors of Brunswick county and the said Atlantic and Danville Railway Company were defendants.

From the record in said suit, a transcript of which is herewith presented as a part of this petition, it will be seen that the
2 object of the suit was to obtain an adjudication of the said circuit court that all the proceedings of every kind, whereby it had been attempted to bind the county of Brunswick as a subscriber to the capital stock of said Atlantic and Danville Railway Company, were unconstitutional, *ultra vires*, irregular, null, and void; to enjoin and restrain the said railway company from disposing of any of the bonds of said county of Brunswick, which had been issued to the said company prior to the commencement of this suit, in part payment of its alleged subscription to the capital stock of said company; and to enjoin and restrain the said board

of supervisors from issuing any other bonds of said county to the said railway company, and from doing any other act whereby said county might become a subscriber to the said capital stock of said railway company.

This suit was instituted on the 25th day of March, 1889, and a temporary injunction awarded March 23d, 1889, previous thereto. The defendant railway company filed its demurrer and answer to the bill of complaint of your petitioners. And thereupon the said suit came on, by the consent of parties, to be heard on the 26th day of February, 1890, in the vacation of the said circuit court, on the bill, answer, and exhibits filed with each, the general replication to the said answer, and the depositions of witnesses and other evidence. On consideration whereof, the said circuit court, being of opinion that your petitioners had failed to show themselves entitled to relief in equity, dissolved the said injunction and dismissed your petitioners' bill.

Your petitioners are advised that the said decree is erroneous, and assign the following errors therein, said errors being assigned in different order from the errors in said subscription as alleged in the said bill of complaint.

(1.) The alleged subscription of the county of Brunswick to the capital stock of the Atlantic and Danville Railway Company was made in utter disregard and violation of the general law of this Commonwealth (Code 1873, chap. 61, § 62, and *seq.*) authorizing municipal corporations to become subscribers to the capital stock of works of internal improvement. So far, therefore, as the said general law is concerned, said subscription is unauthorized and void. (See Record, page 14.)

About this proposition, we take it, there can be no controversy. This court has decided in the recent case of Taylor and others *vs.* The Supervisors of Greensville County and The Atlantic and Danville Railway Company, 10 S. E. Report, 433, that the subscription made by the county of Greensville, which is identical with the subscription made by the county of Brunswick in respect to this
3 proposition, is not a subscription under the general law, but derives its validity from authority supposed to be conferred on said county of Greensville by provisions contained in the charter of the said railway company. And, in fact, the said railway company, by its answer in this cause, admits that under said general law the said subscription is unauthorized and void; but insists that the said county of Brunswick is authorized, by provisions contained in sections 9 and 10 of its own charter, to make said subscription.

Numerous authorities might be cited in support of the proposition that wherever there are constitutional or statutory limitations upon the power of municipalities to contract debt, municipal contracts to pay debts exceeding the amount of such limitations are void absolutely.

The provision contained in section 62 of chap. 61, Code 1873: "The said order (the order of court submitting the question of subscription to the voters) shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of

the total capital stock of said company, or an amount the interest upon which, at the rate authorized by the council, or board of trustees, of any city or town, or board of supervisors of any county, or township board of any township, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars," is mandatory (Redd *et als. vs.* Supervisors of Henry County, 31 Gratt., 695), and a violation of this provision is sufficient to invalidate subscriptions voted under the general law.

The record in this case shows that the order of court submitting the question of voting a subscription to the capital stock of the Atlantic and Danville Railway Company merely stated a subscription of $3,500 for every mile to be constructed in said county. Said order did not state the maximum amount, for the maximum amount was undetermined; neither did it state the number of miles, for this, also, was unascertained. The amount of subscription voted, however, as shown by the record, largely exceeds the amount prescribed as a limit by said provision. Obviously, therefore, this subscription must depend for its validity on the provision contained in sections 9 and 10 of said charter of the Atlantic and Danville Railway Company.

It is submitted, however, that the said charter of the said company, which, as alleged in the bill of complaint, is entitled "An act to incorporate the Atlantic and Danville Narrow-gauge Railroad Company," in so far as it purports, by said sections 9 and 10, to authorize certain counties named, and among them Brunswick county, to subscribe to the capital stock of the said railway company, is in conflict with both mandates of § 15, Art. V, of the constitu-
4–29 tion of Virginia, which provides that "no law shall embrace more than one object, which shall be expressed in its title;" and said sections are therefore void and constitute no authority for said subscriptions to said stock. (Camden A. R. Co. *vs.* May's L. & E. H. C. R. Co. (N. J.), 7 Atl. Rep., 523; People *vs.* Hamill, 17 N. E. Rep., 799; Snell *vs.* The City of Chicago, 24 N. E. Rep., 532; People *vs.* Allen, 42 N. Y., 404; City of San Antonio *vs.* Gould, 34 Texas, 49; Giddings *vs.* San Antonio, 47 Texas, 548; Peck *vs.* San Antonio, 51 Texas, 490; Skinner *vs.* Wilkelm (Mich.), 30 N. W. Rep., 311; People *vs.* Institution, 71 Ill., 183; Brown *vs.* State (Ga.), 4 S. E. Rep., 861; Bryan *vs.* Board of Education (Ky.), 13 S. W. Rep., 276; *Ex parte* Connor, 51 Ga., 571; King *vs.* Banks, 61 Ga., 20; Shepherd *vs.* Helmers, 23 Kan., 504; Igoe *vs.* State, 14 Ind., 239; Grubbs *vs.* State, 24 Ind., 295; Murphy *vs.* State, 9 Lea, 373; M., K. & C. R'y Co. *vs.* Long, 27 Kan., 684; *Re* Blodgett, 89 N. Y., 392; People *vs.* O'Brien, 38 N. Y., 193; Town of Fishkill *vs.* Fishkill and Bukman Plank-road Co., 22 Barb., 634; Weaver *vs.* Lapsley, 43 Ala., 224; People *vs.* Chautauqua County, 43 N. Y., 10; Welch *vs.* Post, 99 Ill., 471; Tingue *vs.* Village of Port Chester (N. Y.), 4 N. E. R., 625; People *vs.* Commissioners St. Contracts (Ill.), 11 N. E. R., 180; Leach *vs.* People (Ill.), 12 N. E. R., 726; Johnson *vs.* Spicer (N. Y.), 13 N. E. R., 753; Supervisors *vs.* McGruder (Va.), 6 S. E. R., 232; Fidelity Ins., T. & S. D. Co. *vs.* Shenandoah Val. R. R. Co. (Va.), 9 S. E. Rep.,

759; Fidelity Ins., T. & S. D. Co. *vs.* Shenandoah Iron Company, 42 Fed. Reporter, 372.

* * * * * * *

30 (2.) A large proportion of the voters of said county of Brunswick, who voted for said subscription, were induced to do so by false and fraudulent representations of the said Atlantic and Danville Railway Company, through its president and vice-president. (See Record, page 5.)

(3.) The election held to take the sense of the voters of said county of Brunswick on the question of subscription to the capital stock of said Atlantic and Danville Railway Company was void, for the reason that the statute in regard to the manner of holding and conducting said election was violated in many essential particulars, among which are the following: No poll books were kept by the judges of elections at many of the voting precincts of said county, and no returns were made therefrom to the clerk's office of the county court of said county; the said judges of election did not inspect the ballots as presented by the voters at said election, nor did they instruct the voters so that they might vote understandingly upon the question; and at some of the precincts the law was openly violated, and the voters were told that those who desired to vote for the subscription should write their names on the ballots, but that those who desired to vote against the subscription need not write their names on the ballots, and, in fact, that it was unnecessary for them to vote at all. In consequence of which frauds and misrepresentations the said vote was improperly and illegally taken. (See Record, pages 6 and 7.)

31 (4.) At the time of making said pretended subscription the said Atlantic and Danville Railway Company had no legal existence as a corporation, and was not authorized to make any legal contract with said county. (See Record, page 10, and reasons given.)

(5.) At the time of making said subscription the said railway company had no legal existence, for the further reason that it had not deposited with the treasurer of this Commonwealth the sum of $20,000, as required by its said charter. (See Record, page 12.)

(6.) That the said Atlantic and Danville Railway Company, after the said subscription by the said county of Brunswick had been made in manner and form as aforesaid, has unlawfully and fraudulently violated the spirit of the said contract of the said subscription by executing a mortgage on the said road far in excess of the value of said road, and fraudulently issuing large quantities of stock, for the purpose of rendering valueless the stock of the said county of Brunswick, and other counties, and to prevent said counties from exercising any control in the affairs of said company, which, but for such fraudulent issue of stock, said counties would, and of right ought to, have in said affairs of said company.

For the foregoing and other reasons apparent on the face of the record, your petitioners are advised that there was error in said decree entered by the said circuit court of Brunswick county on the

26th day of February, 1890, for which said decree ought to be reviewed and reversed: and they, therefore, pray that an appeal from said decree may be allowed, and that a supersedeas may be allowed, and that said decree may be reviewed and reversed.

May process issue, &c.

R. S. POWELL,
W. H. BARROW,
THOMAS BRANCH,
W. H. VALENTINE,
J. W. BAILEY,
N. M. NEBLETT,
S. J. MOSELEY,
R. W. EANES,
J. R. MANSON,
E. R. JOHNSON,
HENRY TUCKER,
STERLING J. WALLACE,
EDWARD BARROW,
THOMAS F. JONES,
D. O. TURNER,
By COUNSEL.

32 GEORGE P. BARHAM,
J. F. WEST,
E. P. BUFORD,
Attorneys for Petitioners.

I, E. P. Buford, counsel practicing in the supreme court of appeals of Virginia, do certify that in my opinion it is proper that the decree complained of in the foregoing petition should be reviewed by said court.

E. P. BUFORD.

February 13th, 1891.

FEBRUARY 17TH, 1891.

Appeal allowed and supersedeas awarded. Bond to be given in the penalty of $500, conditioned as the law directs.

T. T. FAUNTLEROY.

To the clerk of the supreme court of appeals, at Richmond, Va.

Transcript of Record.

"Pleas at the court-house of the county of Brunswick, before the circuit court of said county, on the 1st day of March, A. D. 1890.

Be it remembered that heretofore—to wit, on Monday, the 25th day of March, A. D. 1889—came R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W. Eanes, J. R. Manson, E. R. Johnson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, and exhibited their bill of complaint against the de-

fendants, The Atlantic and Danville Railway Company, a corporation chartered under the laws of the State of Virginia, and H. E. Young, T. T. Elmore, J. B. Williams, R. R. Seymour, and R. H. Whittaker, supervisors of Brunswick county; which bill is in these words:

To the Honorable Beverly A. Hancock, judge of the circuit court of the county of Brunswick:

The bill of complaint of R. S. Powell, W. H. Barrow, Thomas
33 Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W. Eanes, J. R. Manson, E. R. Johnson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, resident citizens and tax-payers of the county of Brunswick, who sue on behalf of themselves and all other citizens and tax-payers of said county who will make themselves parties to this suit and contribute to the costs of the same, most respectfully represents that they are citizens and tax-payers of the said county, owning taxable property therein, both real and personal, and, as such, are interested in all acts done or to be done by said county in its corporate capacity, or by its board of supervisors, whereby the taxes to be levied by said board upon taxables situate in said county may be increased, and especially in the several matters hereinafter to be mentioned; that by a certain act of the General Assembly of Virginia, entitled "An act to incorporate the Atlantic and Danville Narrow-gauge Railroad Company," approved April 21, 1882, and constituting chapter 95 of the acts and joint resolutions passed by the General Assembly of Virginia during its session of 1881–'2, there was incorporated a certain railroad company under the name and style of the Atlantic and Danville Railway Company. The railway authorized to be constructed and operated under this act of assembly was to have its eastern terminus at the most available point at deep water on James river within the county of Surry, and its western terminus at a point at or near the city of Danville, its line to pass through or near the town of Waverly, in the county of Sussex; thence by the most direct and practicable route to a point at or near the town of Belfield, in the county of Greensville; thence by the most practicable route to a point at or near Brunswick court-house; thence by the most practicable route to a point at or near the town of Boydton, in the county of Mecklenburg, and thence by the most practicable route to its terminus; that in accordance with the provisions of said charter and the general law upon the subject of subscriptions by counties, cities, and towns to works of internal improvement, the said Atlantic and Danville Railway Company made application to the county court of Brunswick county to enter an order to take the sense of the qualified voters of said county upon the question of making a subscription on behalf of the county to the capital stock of the Atlantic and Danville railway, and on the 29th day of March, 1883, an order was entered by said court directing the question to be submitted to the qualified voters at the election to be held for said county on the fourth Thursday in May,
34 1883, an office copy of which order is herewith filed, marked

"No. 1," and exhibited as a part of this bill; that an election was so held at said time, and commissioners were appointed to canvass the returns, who reported to the court that the subscription had been carried in the manner directed by law, which fact was certified by the court to the board of supervisors for its action, and a subscription of $3,500.00 per mile of the main line of said railway which should be constructed within the limits of the county was made, and agents were appointed to make the said subscription on the books of said company, all of which will more fully appear from office copies of the order appointing the commissioners, the report of said commissioners, the order of court certifying the result of the election to the board of supervisors, and the order of the said board making the subscription, herewith filed, marked "Nos. 2, 3, 4, and 5," and exhibited as parts of this bill; that the said Atlantic and Danville Railway Company are now constructing a railroad of standard gauge in the county of Brunswick, and have made application to the board of supervisors to issue bonds to said company at the rate of $3,500.00 per mile for each mile of road constructed in said county, and bonds for five miles of said road have already been issued, amounting to the sum of $17,500.00, and have been delivered to the said railway company; and application has recently been made to the said board of supervisors to issue bonds to said company for four additional miles of railroad, claimed to have been constructed within the limits of said county, at the rate of $3,500.00 per mile, and action upon the matter of the issuing of the said bonds for the four miles last mentioned is now pending before said board of supervisors.

And your complainants, as citizens and tax-payers of said county, believing that they have the right to resist the placing of all improper taxation upon the tax-payers of the county, and believing that the said subscription on behalf of the county to said railway company — improper and void, and that some action should be taken by the tax-payers to prevent the further issue of bonds to said company, allege that the election so held and the subscription so made by the board of supervisors is null and void, and should be so declared, for the following reasons:

Your complainants believe and charge that a large proportion of the voters of the county who voted for the subscription to said company were induced to do so by the false and fraudulent representations of the said company, through its then president and vice-president. The county is divided into two sections by the
35 Meherrin river, the court-house being situated on the north side of said river, and about four miles therefrom; and for several days prior to, and on the day the election was held, the president of said company was on the north side of said river representing to the voters that the said railroad would be constructed on that side of the river, in accordance with the provisions of the charter, and the vice-president of said company was at the same time on the south side of said river falsely and fraudulently representing to the voters that the said road would be entirely constructed upon that side of the river, and your complainants charge that but

for said fraudulent representations, and many other false and fraudulent representations the subscription would have been defeated by a large majority.

That the said election held as aforesaid was void for the further reason that the statute in regard to the manner of conducting said election was violated in many essential particulars, amongst which are the following: No poll book was kept by the judges of election at Dromgoole's, Kelly's Store, Gholsonville, or Rock Store, Tillman's, Sunny Side, Edmunds's Store and Sturgeonville precincts, and no returns were made therefrom to the clerk's office of the county court of said county; that the judges of election in said county did not inspect the ballots as presented by the voter at said election, nor did they instruct the voters so that they might vote understandingly upon the question, and at some of the precincts the law was openly violated and the voters were told that all who desired to vote for subscription must write their names on the ballots, but that those who desired to vote against subscription need not write their names on the ballots, and that it was, in fact, unnecessary for those who opposed the subscription to vote at all; and your complainants charge that on account of said failure of the judges so to instruct the voters, and by giving them improper information, large numbers of ballots were deposited which were counted by the judges, but were thrown out by the commissioners of election. And your complainants believe a sufficient number were so thrown out to have changed the result of the election; that proper returns were not made by the judges of election from the several precincts to the judge of the county court, as the law requires, and the ballots for and against subscription were not put in separate sealed packages, as the law requires; but the ballots in many instances were returned to the clerk's office along with the ballots for county officers, and strung on a string, and not separated and not marked. That the said Atlantic and Danville Railway Company, by its agents
36 and attorneys, undertook and did attempt to purge the registration books of the county, by getting the registrars at various precincts, between the regular registration day and the day of election, to strike from the said books the names of a large number of voters, representing that they had died or removed, when a number of said voters were still living in the respective districts, and had not removed; and your complainants charge that, but for said illegal mode of purging the books so adopted, the number of votes cast at said election for subscription would not have been a majority of the registered voters of the county, and that after the election the said company, seeing that the subscription was defeated, unless the number of registered voters in the county was further reduced, induced the commissioners of election to pass a resolution by which a sufficient number of names were improperly stricken from the books by the registrars, and by the commissioners of election themselves, to make the number of votes cast for subscription a majority of the registered vote of the county. The commissioners of election report to the court that 399 votes were cast against subscription, when the fact is that 487 votes were cast against subscrip-

tion, the commissioners having refused, without authority of law, to count 88 votes that were cast against subscription, and the commissioners were requested to state this fact in their report to the court, which they refused to do. The commissioners reported that they ascertained the number of votes cast by freeholders for subscription to be 206, and the number against subscription to be 140, and that a majority of the freeholders voting upon the question were in favor of subscription, when the fact is that said commissioners of election refused to count the ballots of 88 voters against subscription, which they failed to examine to see whether said ballots were cast by freeholders or non-freeholders; and your complainants charge that a sufficient number of these votes illegally thrown out were by freeholders to have defeated the subscription. The said commissioners also counted at least four persons voting as freeholders who did not own a foot of land in the county.

Your complainants represent that some of the facts above set forth in regard to the election, being an undue election and false return, were set forth in a petition filed in the county court of said county, but that said petition was dismissed without passing upon the merits of the case, as the records of the said court and of the circuit court of said county will show.

Your complainants further state to your honor that the said election was not held according to the requirements of law, because the order under which it was conducted did not state the maximum amount proposed to be subscribed, and was for various other reasons irregular, null, and void.

37 Your complainants further charge that the act of incorporation of the Atlantic and Danville Narrow-gauge Railroad Company, approved April 21st, 1882, is unconstitutional and void, because the law embraces more than one object, and because the objects of the act are not expressed in the title, as required by section 15, article V, of the constitution of Virginia.

Your complainants further represent unto your honor that they are informed, believe, and now here charge, that at the time of the pretended subscription by the county of Brunswick, under and by virtue of the illegal and undue election aforesaid, that the Atlantic and Danville Railroad Company did not have any legal existence, and was not, therefore, authorized to make any valid and binding contract with said county, for the reasons following—to wit:

First. The act of incorporation approved April 21st, 1882, in so far as it authorizes the counties therein named to subscribe to the capital stock of the Atlantic and Danville Railroad Company, is unconstitutional and void, being inhibited by sections 12, 14, and 15 of article X of the constitution of Virginia, for surely a State cannot authorize one of its subdivisions to do what it has not the power and authority to do as a whole.

Second. The fourth section of the act of incorporation declares that "whenever fifty thousand dollars of the capital stock of said company shall have been subscribed other than by railroad or internal improvement companies, and five per centum thereof shall have been paid thereon, the persons named in the first section of

this act, and their associates, successors, and assigns, who may become stockholders, shall be, and are hereby declared to be, a body politic and corporate under the name and style of the Atlantic and Danville Railway Company." Now your complainants claim that, under a proper construction of so much of the above section as has been quoted, that the said corporation could have no legal existence until fifty thousand dollars of the stock had been subscribed by persons other than railroad or internal-improvement companies, and 5 per cent. of said sum had actually been paid in. And your complainants have been informed and believe, and do now here so charge, that at the time of the attempted subscription on the part of the county of Brunswick that fifty thousand dollars of the stock had not been subscribed, and 5 per cent. thereon had not been paid, as required by the provisions of the said section.

Third. The first clause of the 11th section of the act of incorporation is as follows: "Provided that before the rights hereby
38 conferred shall become vested, and before the actual work of construction shall commence, other than upon the land purchased or owned by said company, there shall be deposited with the treasurer of the Commonwealth, under his official bond, twenty thousand dollars, either in money or bonds approved by the treasurer, to be held by such officer to the credit of the president and board of directors of the Atlantic and Danville Railway Company, and subject to their order, when and only after the like amount of twenty thousand dollars has been expended upon said railroad, and the same so certified to the treasurer of the Commonwealth by the railroad commissioner."

And your complainants believe and charge that at the time of the election in the county of Brunswick, and when the order of the board of supervisors was made thereunder—to wit, on the 3d day of July, 1883—that said sum of twenty thousand dollars had not been deposited with the State treasurer, as required by the provisions of the 11th section of the act of incorporation. And as the rights conferred by the said act were made to depend upon, and did not become vested until the deposit of the said sum was made, the said Atlantic and Danville Railway Company had no legal existence under the laws of this Commonwealth, and could not, therefore, make a contract, or do any act binding upon itself or any person or corporation.

And your complainants further claim that the act of incorporation hereinbefore referred to, and which was approved on the 21st day of April, A. D. 1882, was not intended to repeal or in any way change or alter the sixty-second, sixty-third, sixty-fourth, sixty-fifth, and sixty-sixth sections of chapter 61 of the Code of Virginia of 1873, so far as the same apply to the Atlantic and Danville Railway Company, or to any other work of internal improvement; that there is nothing in said sections, or any of them, which conflict with the act of incorporation of the defendant company, and by the fourth section of said act it is specially provided that the said company "shall be entitled to all the powers, authorities, and privileges contained in all general laws of the State of Virginia applicable to

railway companies, and be subject to all the limitations and restrictions imposed by said laws which are not inconsistent with the provisions of this act."

And your complainants charge that the said act of incorporation did not confer upon the counties named therein any greater power in reference to subscriptions to the capital stock of the defendant company, or authorize said counties to subscribe any greater
39 amount than they were authorized to exercise and subscribe under the general law as contained in the Code of 1873, so that the county of Brunswick was not authorized to subscribe to the capital stock of the said company more than one-fifth of the total amount of said stock at the time of the said subscription, which your complainants now charge did not exceed the sum of two hundred thousand dollars, even if it reached that amount. Nor could the county of Brunswick subscribe an amount, the interest upon which, at the rate authorized by the board of supervisors, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars; and your complainants charge that the value of all the real and personal property in the county of Brunswick subject to taxation for the year 1883 amounted to the sum of $1,516,174.05, as will more fully appear by a certificate from the deputy clerk of the county of Brunswick, herewith filed, marked "Exhibit Certificate," as a part of this bill, that a tax of twenty cents upon each one hundred dollars would yield the sum of $3,022.34; from which must be deducted, for cost of collection, the sum of about $181.34; leaving the sum of $2,841, which will not pay the interest at six per cent., the rate allowed by the board of supervisors, upon the sum of forty-eight thousand dollars; so that the said sum of $48,000 was the maximum amount which the county of Brunswick, in the year 1883, was authorized to subscribe to the capital stock of the defendant company, even admitting that the said company was authorized to receive subscriptions and make the contracts which it attempted to do. Yet your complainants allege, as hereinbefore stated, that, notwithstanding the restrictions and limitations upon their powers contained in the sixty-first chapter of the Code of 1873, in reference to works of internal improvements, the board of supervisors of the county of Brunswick, on the 3d day of July, 1883, and before the route of the road of the defendant company was ascertained and located, and before it was known how many miles of track it would lay in said county, subscribed to the capital stock of said company the sum of $3,500 per mile, as will more fully appear by reference to the exhibits filed with this bill; that an appeal was taken by six citizens of the county of Brunswick to the above-mentioned order of the board of supervisors to the circuit court of said county, and, without being heard upon its merits, was dismissed, because the said circuit court did not have jurisdiction; that at the time of said order, to wit, on the 3d day of July, 1883, it was not known how many miles the road of the defendant company would run through the county of Brunswick, and, of course, it could not be known that the maximum
40 amount of subscription would exceed the limits fixed by law;

but it has now been ascertained by the engineers of the said company that the road of the Atlantic and Danville Railway Company in said county will be between twenty-one and twenty-two miles long, so that, at $3,500 per mile, the amount subscribed by the county of Brunswick will be about the sum of eighty thousand dollars, or more than $32,000 in excess of the largest amount allowed by law, if, indeed, any subscription is authorized under a proper construction of the laws of the Commonwealth of Virginia relating to this subject.

Your complainants further show to your honor, as before stated, that under the first act of incorporation the Atlantic and Danville Railroad Company was only authorized to construct a narrow-gauge road, three feet wide, "from the most available point at deep water on James river, in the county of Surry," through the counties named in said act, to the town of Danville, Virginia; that it is well known that a narrow-gauge road can be constructed and equipped at far less expense than a road of standard gauge, and the operating expenses, wear and tear of the narrow gauge is far below the expense for operating and the wear and tear of the standard gauge; that one of the inducements offered to the people of Brunswick at the election held for the subscription, and to the supervisors when the amount of the subscription was attempted to be fixed by the order of July 3d, 1883, was that the county of Brunswick would be in large measure reimbursed for its outlay by the value of the stock of the company which it would receive for its bonds; that as the road could be built for about $3,000 or $3,500 per mile, the stock would be nearly worth its face value. But, notwithstanding all of these representations and inducements, the said Atlantic and Danville Railway Company, through its officers or agents, sought and obtained from the legislature of Virginia an amendment to its charter, which was approved on the 24th day of February, A. D. 1886, and which appears in the Session Acts of 1885–'6, commencing on page 214. By this amendment, sought and obtained by the said company, without the knowledge or consent of the county of Brunswick, the Atlantic and Danville Railway Co. was authorized to change the gauge of the road already constructed, and to build a branch road from any point on its main line, east of the town of Hicksford, to a point on the Elizabeth river in or near the city of Norfolk, or in or near the city of Portsmouth, Va. And by the 12th section of said amending act the defendant company was "authorized to build and construct wharves, piers, warehouses, and such other structures as may be necessary for the convenient and safe
41 loading, unloading, shipping, receiving, and storing all kinds of personal property and merchandise; and may build, purchase, charter, or operate steam or other vessels on the waters of this Commonwealth in connection with its said railway;" which said amendment to its original charter was, at a general meeting of the stockholders of the Atlantic and Danville Railway Company, held at Norfolk on the 7th day of ——, 1886, duly adopted and accepted, and the following resolution was passed:

"On motion of Mr. Wilkerson, seconded by Mr. Burruss, and

unanimously adopted, it was resolved that the act of the General Assembly of Virginia entitled 'An act to amend and re-enact sections 2, 6, 9, and 12 of an act entitled An act to incorporate the Atlantic and Danville Narrow-gauge Railroad Company, approved April 21, 1882, and also to amend and re-enact the title of said act, approved February 24, 1886,' be, and the same is hereby, accepted by this company."

That, acting under the said act of February 24, 1886, the defendant company, on the 1st of February, 1887, applied for and obtained from the common council of the city of Portsmouth a proper order of election, submitting to the voters of said city the question of making a subscription of $150,000 to the capital stock of said company, at which election the voters voted the subscription as authorized by said act. That acting under the same act of the legislature, it has obtained from the county court of Norfolk county proper order looking to the condemnation of lands in said county for the use of said railway, and has constructed a road of standard gauge from Portsmouth, a distance of some seventy-five miles in the direction of Danville. And all of these several acts in violation of the original contract between the county of Brunswick and the defendant company have been done without the consent and concurrence of the said county. Your complainants are informed and believe, and therefore charge, that the defendant company, by its officers and agents, went to see the members of the board of supervisors of the county of Brunswick and attempted to induce them to approve the said amendment of February 24, 1886, but the said supervisors, or a majority of them, declined to do so.

Your complainants further show that, notwithstanding the various facts set out in this bill going to show that the Atlantic and Danville Railway Company had no legal existence in July, 1883, and were not, therefore, authorized to make any contract with the county of Brunswick, and notwithstanding the fact that the subscription to the stock of said company was never really ordered
42 by the election held in Brunswick for that purpose, as has been hereinbefore more fully set forth, and notwithstanding the amendment of Feb'y 24th, 1886, materially changing the plans, purposes, and objects of the company, which was duly accepted and acted on by the defendant, the board of supervisors, acting upon the order of the county court of Brunswick, and upon the report of the commissioners appointed for the purpose, that five miles of the road of the defendant company, in the county of Brunswick, had been graded and the track laid, upon the 21st day of January, 1889, ordered the issue and delivery to the Atlantic and Danville Railway Co. of bonds of the county aforesaid amounting to the sum of $17,500, and received therefor the stock of the company for the same amount, as hereinbefore stated; that heretofore the said county has never had any rights to appear by proxy at the meeting of the stockholders of the said company, and has never at any time been consulted in reference to any of its acts, or exercised any share in the control and management of the business of said Atlantic and Danville Railway Com-

pany; that on the 4th day of March, 1889, the commissioner appointed for the purpose reported to the county court of Brunswick that four additional miles of road had been graded and the track laid in said county, and the said county court certified said report to the board of supervisors, who met on the 12th day of March, A. D. 1889; and the matters stated in this bill having been brought to their attention (the said board), and a doubt having arisen in their minds as to their power and authority to issue any more bonds of the county of Brunswick, they postponed further action until they could be properly advised, but will again convene on the 3d day of April, 1889, for the purpose of taking action upon the said report and order, and unless stopped by an order from some court of competent jurisdiction, the said board of supervisors may, and doubtless will, decide that they are obliged to issue the bonds of the county to the amount of $14,000. And as said bonds are negotiable, and, in the hands of *bona fide* holders for value, will not be open to all of the defences which might be made against them in the hands of the original holder, or which the county is entitled to make thereto, your complainants are advised that the issue of the same and all other bonds should be, and will, upon proper application, be restrained by injunction; that this course is due to the county, to the board, that they may be released from all personal responsibility in the premises, and to possible innocent holders, who, looking alone to the credit of the county of Brunswick, and not knowing the facts, might be induced to part with money for worthless securities.

43 And your complainants further show to your honor that, in addition to the sum subscribed by the county of Brunswick, and by the other counties through which the road of the defendant passes, the company has executed a mortgage and caused the same to be recorded in the county of Brunswick and other counties along its line, by which it is authorized to issue bonds, called first-mortgage bonds, to the amount of $16,000 per mile for each mile graded and upon which the track has been laid; that the road is being constructed in the most careless and temporary manner, and, as far as your complainants are informed and believe, on the cheapest possible plan; that no masonry of any kind is being used; that the cars show that many, if not all of them, belong to some car trust, and are leased by the defendant company, and your complainants are induced to believe, and do now here so charge, that the real and necessary expense of constructing the road as it is now being built ought not to exceed $5,000 per mile; that there can be no use for such a large issue per mile of the bonds of the company for any legitimate purpose, and that they are either being sold at a ruinous sacrifice, or being absorbed by the officers of the defendant company, thereby wrongfully and fraudulently rendering valueless the stock of the company for which the county of Brunswick has subscribed, and which on the market to-day will not bring twenty-five cents on the dollar, and which is daily becoming less and less valuable. And now your complainants charge that for the reasons set forth in this bill, and many others which may appear properly in proof under the general allegations herein made, the board of supervisors of the county of Brunswick had no power or authority

to issue the $17,500 of bonds already delivered to the defendant company, and have no power of authority to make any further issue of said bonds, and that their action in respect thereto has been *ultra vires*, and all of said bonds are null and void, and any which may be hereafter issued will also be null and void and of no effect. In tender consideration whereof, and inasmuch as your complainants are without remedy save in a court of equity, where matters of this kind are properly cognizable and relievable, they pray that the board of supervisors of the county of Brunswick and the Atlantic and Danville Railway Company may be made defendants to this bill and required to answer the same; and that your honor will cause the said Atlantic and Da-ville Railway Company to produce its books to some commissioner of your honor's court, that the allegations herein made may be thoroughly investigated and examined, that your honor will adjudge and declare all the proceedings of every kind whereby it has been attempted
44 to bind the county of Brunswick as a subscriber to the capital stock of said railroad company irregular, null, and void; that your honor will enjoin and restrain the Atlantic and Danville Railway Company from disposing or parting with any of the bonds of the county of Brunswick heretofore issued to it, and now in hand and in the possession of said company; that your honor will enjoin and restrain the board of supervisors of Brunswick county, both the present members of said board and their successors in office, from issuing any bonds of the said county to said railroad company, and from doing any act whereby said county may become bound as a subscriber to said capital stock; and that your honor will grant unto your orators such other, further, and general relief as equity may dictate and the facts of the case require. Your complainants, confident of their ability to prove all of the allegations made in this bill, hereby waive answers under oath from the defendants; that all proper process may issue.

And, as in duty bound, they will ever pray, &c.

R. S. POWELL,
W. H. BARROW,
THOMAS BRANCH,
W. H. VALENTINE,
J. W. BAILEY,
N. M. NEBLETT,
S. J. MOSELEY,
R. W. EANES,
J. R. MANSON,
E. R. JOHNSON,
HENRY TUCKER,
STERLING J. WALLACE,
EDWARD BARROW,
THOMAS F. JONES,
D. O. TURNER,
By COUNSEL.

R. O. TURNBULL,
W. H. MANN,
F. C.

COMMONWEALTH OF VIRGINIA, *County of Brunswick*, } *To wit:*

I, Chas. S. Barrow, a notary public in and for the county and State aforesasd, do hereby certify that W. H. Barrow, whose name appears above, this day personally appeared before me in my county aforesaid, and made oath that, so far as the statements in this
45 bill are based on his own information, he knows them to be true, and, so far as based on information derived from others, he believes them to be true.

Given under my hand this 22d day of March, A. D. 1889.

CHAS. S. BARROW,
Notary Public.

EXHIBIT "1," Filed with Bill.

VIRGINIA:

In Brunswick County Court, March Term, 1883.

On the application of the Atlantic and Danville Narrow-gauge Railroad Company for a subscription by this county to the capital stock of said company of the sum of $3,500 per mile for each and every mile of railroad the said company may construct within the limits of said county, provided that no part of said subscription made by said county shall be due or payable until it shall be certified that one mile or more of said railroad shall have been graded and the track laid thereon, in accordance with the provisions of the act of assembly granting a charter to said company, the court, in accordance with the provisions of sections 62 and 63, chapter 61, Code of Virginia 1873, doth order that the several judges of election at each of the voting precincts in this county do, at the next general election—to wit, on the 24th day of May, 1883—open a poll and take the sense of the qualified voters on the question whether the board of supervisors of this county shall subscribe to the capital stock of the said Atlantic and Danville Narrow-gauge Railroad Company the sum of $3,500 per mile, as above recited, and such subscription to be made under the terms of the charter of said company, as published in the acts of the General Assembly of Virginia, 1881–'2. The said judges of election shall, after taking an oath to faithfully discharge the duties herein assigned them, open the polls at the various places of voting in the said county, at the time herein designated, and shall conduct such election and close the polls in such manner as is provided by law in other elections; and at said election each qualified voter who shall approve such subscription shall deposit a ticket or ballot, on which shall be written or printed the words, "For subscription," and each voter who shall oppose said subscription shall deposit a ticket or ballot whereon shall be written or printed "Against subscription;" and each ballot shall be endorsed with the name of the voter, which shall be inspected by the officers conducting the election at the respective voting places. The judges of election at the several
46 places of voting shall immediately after the closing of the polls at each said place, count the ballots deposited, and shall,

within two day after said election, make return to the judge of the county court of this county of the number of votes cast for, and the number of votes cast against, subscription, and shall return to and deposit with the clerk of said court, in separate sealed packages, the ballot for or against subscription.

A copy.
Teste. CHAS. E. MAY, *D. Clerk.*

EXHIBIT "2," Filed with Bill.

In the Clerk's Office of the County of Brunswick.

MAY 26, 1883.

The following order was this day received by the clerk, in vacation, of the county court of Brunswick county, and admitted to record as follows—viz:

In the Vacation of the County Court of Brunswick County.

MAY 26TH, 1883.

The court doth appoint Thomas B. Price, Thomas Davie, W. T. Sledge, and Warner Lewis, who, with the clerk of this court, shall constitute a board of commissioners, whose duty it shall be to, within two day, meet at the office of said clerk, and, having taken an oath before said clerk faithfully to discharge their duties, open the packages of ballots for and against the subscription to the Atlantic and Danville railroad deposited with the said clerk, count the same, correct the returns, if needed, and ascertain and report whether three-fifths of the qualified voters of the county voting upon the question are in favor subscription, how many of the said ballots were cast by freeholders, and how many by non-freeholders, for and against the subscription respectively, and whether the vote cast for subscription is a majority of the registered voters of the county; which said report, signed by a majority of said board, shall be entered on the order book of said court.

F. E. BUFORD.

Teste. E. R. TURNBULL, *Clerk.*
A copy. CHAS. E. MAY, *D. C.*

47 EXHIBIT "3," Filed with Bill.

To the Hon. F. E. Buford, judge of the county court of Brunswick county:

In pursuance of an order made by your honor, bearing date at the county of Brunswick, on the 26th day of May, 1883, we, Thomas Davie, Warner Lewis, T. B. Price, W. T. Sledge, together with E. R. Turnbull, the clerk of this honorable court, met at the office of said clerk, on the 28th day of May, 1883, within two days of the date of said order, and, having taken an oath before said clerk faithfully to discharge our duties, proceeded to open the packages of ballots mentioned in said order, and to count the same; and we do further re-

port that we ascertained the number of ballots cast for subscription to be fifteen hundred and sixteen (1,516), and the number of ballots cast against subscription to be three hundred and ninety-nine (399); that we ascertained the number of ballots cast by freeholders for subscription to be two hundred and six (206), and that the number of ballots cast by freeholders against subscription to be one hundred and forty (140). We do further report that three-fifths of the qualified voters of the county voting upon the question were in favor of subscription, and that said three-fifths includes a majority of the votes cast by freeholders at the election and a majority of the registered voters of the county.

In witness whereof we, the commissioners, have to this, our report, set our hands this the 13th day of June, 1883.

E. R. TURNBULL, *Clerk.*
THOMAS DAVIE, *Ch'r.*
WARNER LEWIS.
THOMAS B. PRICE.
W. T. SLEDGE.

I do hereby certify that each member of the board worked fifty-eight hours in attending to duties required by the foregoing order.

THOMAS DAVIE, *Ch'r.*

Lawrenceville, Va., June 13, 1883.

CLERK'S OFFICE, BRUNSWICK COUNTY COURT, *June 13th*, 1883.

This report was returned to said office and admitted to record.

Teste: E. R. TURNBULL, *Clerk.*
Teste: CHAS. E. MAY, *D. C.*

48 EXHIBIT "4," Filed with Bill.

BRUNSWICK COUNTY COURT, *June* 27, 1883.

On the report of the commissioners appointed to ascertain and report the vote for and against subscription to the Atlantic and Danville Railway Company, and it appearing by the report of said commissioners that three-fifths of the qualified voters voting upon the question are in favor of subscription to the said railway company, and that the said three-fifths includes a majority of the votes cast by freeholders at such election, and a majority of the registered voters of the county; and the necessary vote having been obtained for said subscription, the board of supervisors of the county are ordered to meet at Lawrenceville on the 3d day of July, 1883, to carry into effect the wishes of the voters as expressed at such election.

A copy. CHAS. E. MAY, *D. C.*

EXHIBIT "5," Filed with Bill.

At a special meeting of the board of supervisors of Brunswick county, held in the court-house at Lawrenceville on this 3d day of July, 1883, in pursuance of an order of the county court of said county, entered at its June term, 1883, to carry out the wishes of

the voters of said county as expressed at an election held in said county on the 24th day of May, 1883, on the question of a subscription to the capital stock of the Atlantic and Danville Railway Company, the following members of said board being present—W. F. Jones, H. E. Young, J. B. Williams, and J. J. Wesson—they constituting a majority of the whole number of supervisors of Brunswick county, ordered that the county of Brunswick do subscribe to the capital stock of the Atlantic and Danville Railway Company the sum of thirty-five hundred dollars per mile for each and every mile of the main line of said railroad constructed within the limits of the county, according to the provisions of the charter of the said Atlantic and Danville Railway Company, approved April 21, 1882, said subscription to be in bonds of the county, issued in accordance with the charter of said company, payable twenty-five years after the date thereof, and bearing interest at the rate of six per centum per annum from date till paid; and that Dr. G. M. Raney and J. H. Moon be, and the same are hereby, constituted and appointed the agents to make the subscription on behalf of the county.

A copy. CHAS. E. MAY, *D. C.*

49 EXHIBIT "CERTIFICATE," Filed with Bill.

I, Charles E. May, deputy clerk of the county court of the county of Brunswick, in the State of Virginia, do hereby certify that the taxable value of real and personal property in said county, as appears from the commissioners' books for the year 1883, is as follows:

District No. 1—Personal property		$333,221 00
" " Real estate		551,722 00
District No. 2—Personal property		234,690 00
" " Real estate		396,541 05
		$1,516,174 05

Given under my hand this 8th day of June, 1886.

CHAS. E. MAY, *D. C.*

Injunction Order.

An injunction is awarded the complainants, according to the prayer of their bill, to enjoin and restrain the defendant, The Atlantic and Danville Railway Company, from disposing of or parting with any of the bonds of the county of Brunswick, amounting to the sum of $17,500.00, heretofore issued to it, and not parted with by said company, and now in the possession of said company, or under its control, and to enjoin Henry E. Young, T. T. Elmore, J. B. Williams, R. R. Seymour, and R. H. Whittaker, who at present compose and constitute the board of supervisors of the county of Brunswick, and their successors in office, from making any further issue of the bonds of said county to said railway company, and

from doing any act whereby said county may become bound as a subscriber to the capital stock of the said Atlantic and Danville Railway Company until the further order of the circuit court of Brunswick county. But this injunction shall not take effect until the complainants, or some one or more of them, or some one for them, shall first execute bond, before the clerk of the circuit court of Brunswick county, with surety to be approved by said clerk, in the penalty of $1,000.00, payable to the Commonwealth of Virginia, with condition to pay all such costs as may be awarded against the complainants, and all such damages as may be incurred in case the injunction hereby granted shall be dissolved.

F. D. IRVING.

23d of March, 1889.

To the clerk of the circuit court of the county of Brunswick, Virginia.

And now at this day—to wit, in the clerk's office of the circuit court of Brunswick county, March 1st, 1889.

The following orders were this day received by the clerk in vacation of said court, and admitted to record—viz:

R. S. POWELL
vs.
ATLANTIC AND DANVILLE RAILWAY CO.

By consent of parties, given before the judge of this court in vacation, this cause is submitted to the said judge for decision and decree in vacation.

BEVERLY A. HANCOCK.

To the clerk of Brunswick circuit court.

In the Circuit Court of Brunswick Co.

R. S. POWELL *et als.*
vs.
ATLANTIC AND DANVILLE RAILWAY COMPANY. } In Vacation.

This cause came on this day to be heard, by consent of parties, upon the bill and exhibits, the answer of the defendant company and exhibits, with general replication thereto, and the depositions filed herein, and was argued by counsel. On consideration whereof, the court is of opinion that the plaintiffs have failed to show any case entitling them to relief in equity, and doth accordingly order, adjudge, and decree that the injunction issued in this cause be, and the same is hereby, dissolved, and that the bill of plaintiffs be, and the same is hereby, dismissed. It is further ordered, adjudged, and decreed that the defendant company recover of the plaintiffs their costs in this behalf expended.

BEVERLY A. HANCOCK.

To the clerk of Brunswick circuit court.

51 Endorsement on back of foregoing decree.

We consent that this cause may be heard in vacation at Petersburg, Va.

WM. H. MANN,
Of Counsel for Plaintiff.
RO. TURNBULL,
Of Counsel for Plaintiff.
By W. H. MANN.

R. B. DAVIS AND
LEGH R. PAGE,
Attorneys for Defendants.

February 26, 1890.

Answer of A. and D. Railway Co.

In the Circuit Court of Brunswick County, Va.

The demurrer and answer of the Atlantic and Danville Railway Company to a bill of complaint exhibited against it and others by R. S. Powell and others in the circuit court of Brunswick county, Va.

The said defendant comes and says that the said bill is not sufficient in law, and without waiving its said demurrer, but insisting thereon, the said defendant, for answer to so much and such parts of the said bill as it is advised it is material for it to answer, answering, says: It admits that the said plaintiffs are citizens and taxpayers of the county of Brunswick, and, as such, interested in all the acts of the board of supervisors of said county whereby taxes are to be levied upon the tithables resident in said county, as set forth in their bill. But this defendant denies that the said plaintiffs, or any other citizens of the said county, are entitled to come into a court of equity for the purpose of preventing any act of the said board of supervisors in the management and control of the affairs of the county committed to their care and keeping, so long as the said board confine themselves to the exercise of the power given them by law; and especially denies that the said plaintiffs have the right to come into equity to restrain and enjoin the issue of the bonds of the county in payment of the subscriptions made to the capital stock of the defendant company, unless it be made to appear that the said subscription is void.

The said defendant, further answering, admits that it was incorporated by the act of the General Assembly of Virginia,
52 entitled "An act to incorporate the Atlantic and Danville Narrow-gauge Railway Company," approved April 21st, 1882, as set out in the said bill, and that the route designated by the said act is correctly set out in the said bill.

It further admits that, in accordance with the provisions of the charter, and according to the forms prescribed by the general laws on the subject, the question of a subscription to the capital stock of

the said company was, by an order of the county court of the county of Brunswick, submitted to the qualified voters of the said county on the fourth Thursday of May, 1883; that an election was held under the said order; that commissioners of election were appointed, who reported to the county court that the election had been carried in favor of a subscription, in the manner directed by law; which fact was certified by the court to the board of supervisors for its action, and a subscription of $3,500 per mile of the main line of said railway which should be constructed within the limits of the county was made, and agents were appointed to make the said subscription on the books of the company, as charged in the said bill.

And this defendant further alleges that the said subscription was, in fact, made upon the books of the said company, in pursuance of the said order of the board of supervisors. But this defendant denies that the election so held on the said fourth Thursday in May, 1883, was null and void for either of the reasons set forth in the said bill, or for any reason whatever; but, on the contrary, this defendant alleges that the said election was ordered, held, conducted, and completed in substantial compliance with all of the requirements of law, and that the board of commissioners appointed by the said court did, in the mode prescribed by law, open the packages of ballots, count the same, and ascertain and report how many of said ballots were cast by freeholders, and how many by non-freeholders, for and against the subscription, respectively, and report the same to court; and that the report of the said board of commissioners to the said court showed the true and accurate results of said election, and was by the said court properly certified to the board of supervisors, as required by law.

The said defendant, further answering, denies that a large portion of the voters of the county who voted for the subscription were induced to do so by the false and fraudulent representations of the said company, and denies that any false or fraudulent representations of any kind whatever were made by any person or persons authorized to speak for this defendant, or by any person or persons whatsoever, with its knowledge or by its consent. The said defendant further denies that the judges and officers of the election failed
53 to perform the duty required of them by the law, either in conducting the election or making return of the result thereof to the clerk's office, as charged in said bill. It also denies that the said company, by its agents and officers, or in any other manner, did "attempt to purge the registration books of the county by getting the registrars at the various precincts, between the regular registration day and the day of election, to strike from their books the names of a large number of voters, representing that they had died or removed, when a number of said voters were still living in the respective districts, and had not removed," as charged in the said bill, or that the said company, by it agents and attorneys, or in any manner whatsoever, improperly interfered with the said registrars, or the voters, or officers of election, in any manner, either before or during the said election. It further denies that the commissioners appointed by the court to canvass and report the result of election

improperly struck from the registration books any names found thereon, or failed to count the votes of any person or persons that had been lawfully cast in the said election; and, on the contrary, allege that the said commissioners, as far as this defendant knows or believes, did properly canvass the said vote and return to the said county court a true and proper report of the same, as required by the law governing them, and that the said report of the said commissioners of election does show the true and fair result of the said election.

This defendant, further answering, says that it *it* true, as charged in the bill of the plaintiff, that some of the facts set forth in the bill in this case tending to show the invalidity of the said election on account of the improper conduct of the registrars and officers of election, and of the commissioners appointed to canvass and report the result to the county court, were set forth in a petition filed in the county court of the said county, as set forth in the said bill; but it denies that the said petition was dismissed without passing on the merits of the case, as therein set forth. On the contrary, this defendant avers that the said election and returns were subjected to the inquiry, determination, and judgment of the county court of Brunswick county, in the mode prescribed by the statute of the State, upon the written complaint of fifteen or more of the qualified voters of the said county of an undue election and false return, filed in the said county court on the 21st day of June, 1883, and an amended petition filed on the 27th of June, 1883. That the said written complaint and the amended complaint set forth all of the substantial grounds of objection to the validity of the said election, founded upon alleged improper conduct of the registrars,
54 judges, and officers conducting the election, and of the board of commissioners who certified the result thereof to the county court, that are now set up by the plaintiffs in this bill. This defendant was, upon its own motion, made defendant to the said complaint and defended the said contest, and the said county court of Brunswick, on the said 27th day of June, 1883, having fully heard the arguments of the counsel for the said complainants and of this defendant, did determine the said contest, and, being of opinion that the said election was a valid one in favor of the subscription, did enter its order as directed by law, requiring the board of supervisors of the county to attend on a day and at a time mentioned in the said order to carry out the wishes of the people as expressed at the said election; all of which will fully appear from a certified copy of the said original and amended complaint, and the orders therein entered, herewith filed, marked "A," and prayed to be read as part of this answer.

This defendant, further answering, avers that the plaintiffs in the bill filed in this case were legally represented by the said complainants in the said complaint filed in the said contested-election case, which was heard and finally determined by the said county court of Brunswick county, as above set forth, and that the same identical questions as to the validity of the said election, and the returns made thereof to the said county court, which are presented by the

plaintiffs in the bill in this case, were presented for trial and adjudication and determination by the said complaint of an undue election and false returns; and that the said county court of Brunswick county had full and ample jurisdiction to hear and determine the said questions and issues, and each of them in said contest, upon the written complaint aforesaid, and that it did hear and determine the same, and each and all of them; and that the plaintiffs herein are bound by the proceedings and orders of the said county court of Brunswick county entered in the said contest upon the complaint aforesaid, which are in full force, unreversed, and final. And this defendant now sets up the proceedings and orders of the county court of Brunswick in the said contested-election proceedings above referred to, as a bar and estoppel against the plaintiffs here in their efforts to renew the contest as to the validity of the election so finally put to rest.

In reply to all of the allegations of the bill setting up as facts that the county court, in its order submitting the question of subscription to the popular vote, failed to state the maximum amount proposed to be subscribed; that the act of assembly incorporating this defendant was void, because contrary to the State constitu-
55 tion; that the subscription made by the board of supervisors on behalf of the county is void, because the amount is in excess of the amount authorized by law, &c.; this respondent, further answering, says that all of the questions so raised have been settled adversely to the claims of the plaintiffs by the supreme court of this State in the recent case of D. R. Taylor and *als. vs.* The Atlantic and Danville Railway Company and *als.*, in which the same questions were raised upon the construction of the charter and laws governing in the premises, and this defendant deems it immaterial to make further answer thereto.

Further answering, said defendant says that it is not true, as alleged in the bill of the plaintiffs, that this defendant had no legal existence, and was not, therefore, authorized to make any contract with the county of Brunswick on the day the subscription to its capital stock was made by the said county of Brunswick, acting through its board of supervisors, as above set out. On the contrary, this defendant alleges that it was duly incorporated by the act of assembly approved on the 21st day of April, 1882, as set out in the bill, and that the company was duly organized on the 2d day of December, 1882, there being then subscribed 5,756 shares of the stock of said corporation, subscribed for and taken as required by law. A copy of the minutes of the meeting at which the said organization was effected, taken from the books of the company, is herewith filed, marked "B," as a part of this answer. But this defendant is advised that it is immaterial in this case whether the amount of $50,000 referred to in the charter had been subscribed before the subscription was made by the county of Brunswick or not, or whether the $20,000 referred to had then been deposited with the treasurer of the State before that time or not. The performance of neither of those things was necessary to enable the county of Brunswick to make the subscription, nor to enable this defendant

to take the said subscription. Under the charter certain persons were appointed to receive subscriptions for the company, which enured to the benefit of the company when organized. Under the general law counties are authorized to subscribe to the capital stock of any work of internal improvement which has been incorporated by the General Assembly; and the charter of this defendant authorized the subscription to be made to it in terms and by name, using in the charter itself words evidently showing that the legislature intended that a present subscription might be made for the benefit of any company organized thereafter under the provisions of the charter. This defendant therefore insists that, upon a proper construction of the charter of this corporation, the
56 counties named were authorized to subscribe to its capital stock before the organization of the company, as well as after its organization. But even if it were admitted that the provisions referred to created conditions precedent to the granting of the charter, and that the same had not been performed, still the fact remains admitted in these proceedings that the said company was a *de facto* company, professing to act by and through its legally constituted authorities, within the knowledge of the plaintiffs as well as all other persons, for it is alleged that the officers of the company were present in the county at the time of the election, which was held to take the sense of the people upon the question of the subscription, and the county of Brunswick, acting through its properly constituted authorities, did make the contract of subscription with the officers and agents of this defendant, who were in the quiet possession and exercise of the corporate rights granted by the charter; and the county has, by its properly constituted authorities, since that time ratified and confirmed the said contract by paying some $14,000.00, or more, on account of the stock subscribed for, so that the county itself, as a stockholder or subscriber, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to avoid the liability it has incurred by the contract of subscription, and, *a fortiori*, the plaintiffs are estopped from setting up any such defence.

The provisions referred to at best can only be held to authorize the State to proceed to forfeit the charter privileges granted by it to the company; but the State shows no such purpose, but, on the other hand, has, by several amendments to the charter, recognized the validity of the organization of this defendant.

This defendant, further answering, says that it is true, as charged in the plaintiffs' bill, that this defendant is building through the county of Brunswick, and has now completed through the county, a railroad of standard gauge, and that its charter originally provided for the construction of a narrow-gauge road; that this change has been made in pursuance of authority granted by the legislature of the State; that a branch road to the city of Portsmouth has been built in pursuance of the power granted by the legislature, as aforesaid, and that, by the provisions of the said amendment to its charter, this company was "authorized to build and construct

wharves, piers, warehouses, and such other structures as may be necessary for the convenient and safe loading, unloading, shipping, receiving, and storing all kinds of personal property and
57 merchandise, and may build, purchase, charter, or operate steam or other vessels on the waters of this Commonwealth in connection with its said railway," as charged in the bill.

It further admits that it has accepted the amendments contained in the said amendatory act, but it alleges that it had not, at the date of the institution of this suit, nor at any time since that date, taken any steps to put into execution the amendment which authorizes the company to build, charter, or operate steam or other vessels on the waters of this Commonwealth in connection with its said railway, or any power or privilege given to the company by the section of the amended charter referred to, and neither had, at the time of the institution of this suit, nor has since had, any purpose or intention so to do.

And this defendant, further answering, says that the same objection was made in the recent case of Taylor and *als. vs.* The Atlantic and Danville Railway Co. and *als.* above referred to, and was held by the supreme court of this State to furnish no ground for resisting the payment of the county of Greensville under similar circumstances.

This respondent, further answering, says that it is true that the board of supervisors have already issued and delivered to this company bonds of the county to the amount of $14,000.00, in part payment of the county subscription, and this defendant alleges and shows that the whole of the said bonds so delivered to it had been by it, at the date the injunction order in this cause was served upon it, transferred and conveyed to holders thereof for valuable consideration, and no part thereof is now, or was at the date the said notice of injunction was given this defendant, in the possession of or under the control of this defendant.

It is the intention of this defendant to apply to the board of supervisors of the said county to issue the remainder of the bonds due for the subscription of the county as soon as this injunction is dissolved.

This defendant, further answering, says that it is true that it has executed and put upon record a mortgage of $16,000 per mile upon its road-bed and property, and that it hires cars from construction and other companies for its use; but this defendant denies that it is building the track of its road in a careless and temporary manner, as alleged in the bill; and alleges that the construction has been accomplished in a substantial manner, as is evidenced by the report of the commissioner of the county, appointed by the county court *appointed by the court*, under the provisions of the county charter, to inspect and report to the court the number of miles of road upon which the track is substantially laid, a copy whereof will be
58 herewith filed if required. But this defendant is advised that the plaintiffs here are not at liberty to inquire into any such matter, involving only the internal management of the affairs of the company in the conduct of its business, and that it is im-

material for it to answer further touching those allegations of the bill.

This defendant, further answering, says that it is advised that the plaintiffs are not stockholders in this company, and have no right to be heard in this case upon any question as to the internal management and control of its affairs; that the county of Brunswick, and not the plaintiffs, is a stockholder; and that the county is not complaining, and the plaintiffs ought not to be heard to complain unless the county officers, acting for it, are shown to be exceeding the limits of the authority given them by law.

And now, having fully answered, this defendant prays that the injunction awarded in this case may be dissolved, and that it may be hence dissmissed.

In testimony of all which the said defendant has caused this answer to be signed by its president and its corporate seal to be hereto attached.

THE ATLANTIC & DANVILLE RAILWAY CO.,
[SEAL.] By THOMAS EWING, *President.*

Attest: BEN. L. FAIRCHILD, *Secretary.*

EXHIBIT "A," Referred to in the Foregoing Answer.

VIRGINIA:

Pleas at the court-house of the county of Brunswick, before the county court of the said county, on the 27th day of June, 1883.

Be it remembered that heretofore—to wit, on the 21st day of June, 1883—came James Haskins and divers other parties, and filed in the clerk's office of the said county court of Brunswick a written complaint, which is in the words and figures following—to wit:

To the Honorable F. E. Buford, judge of the county court of Brunswick county:

We, the undersigned, citizens and qualified voters of the county of Brunswick, humbly complaining, respectfully represent
59 unto your honor that the election held on the fourth Thursday in May last to take the sense of the qualified voters of the county upon the question of subscribing to the capital stock of the Atlantic and Danville Railroad Company was an undue election, and that the return made by the commissioners appointed by your honor to count the ballots and report the result of the said election is a false return, as will appear from the facts which your complainants set forth, as follows:

The order made by your honor, submitting the question to the voters of the county, directs that the several judges of election at each voting precinct shall open a poll and take the sense of the qualified voters, &c., and directs that the elections shall be conducted and the polls closed in the manner provided by law in other elections; and your complainants believe, and therefore charge,

that this order was not complied with in any particular by the judges of election at a majority of the precincts in the county. No poll book was kept by the judges at Drumgoole's, Kelly's Store, Gholsonville, Tillman's, Sunny Side, Edmonds's Store, and Sturgeonville precincts, and no return was made to the clerk's office of your honor's court, as the law requires, from these precincts. The law and the said order require that "each qualified voter who shall approve said subscription shall deposit a ticket or ballot on which shall be written or printed the words 'For subscription,' and each voter who shall oppose said subscription shall deposit a ticket whereon shall be written or printed 'Against subscription,' and each ballot shall be endorsed with the name of the voter, which shall be inspected by the officers conducting the election at the respective voting places." And — are advised that the object of the law, in requiring the officers conducting the election to inspect the ballots, is for them to see that each voter votes properly and understandingly upon the question. And your complainants charge that the judges of election at most of the voting places in the county failed to comply with the law, and at Tillman's precinct one of the judges of election, an advocate of the subscription, openly violated the law by stating publicly to the voters assembled that all who wanted to vote for the subscription must write their names on the back of their ballots, but those who wished to vote against subscription need not write their names on the ballots, or need not vote upon the question at all, and that it would count in the same way as if they had voted, or had written their names on the ballots. And as a result of these violations of law, or failures on the part of the judges to see that the law was properly complied with, your complainants charge that numbers of voters failed to vote
60 against subscription, and a number of ballots "Against subscription" were put in the boxes by voters at the several voting precincts, upon which their names were not endorsed, and many others upon which the names of the voters were endorsed, but not written or printed "Against subscription," in the exact form prescribed by the order, and were, as a consequence, thrown out by the commissioners who counted the ballots; and your complainants believe, and therefore charge, that there were enough ballots voted upon which there were no names, and which were not made out exactly in compliance with the said order, to change the result of the election. The law and the said order require that the judges of election, upon the closing of the polls at each voting precinct, count the ballots deposited, and shall, within two days after said election, make return to the judge of the county court of the number of votes cast for and the number of votes cast against subscription, and shall return to and deposit with the clerk of the said court, in separate sealed packages, the ballots for and against subscription. And your complainants allege that this portion of the order was complied with by the judges at Drumgoole's, Kelly's Store, and Edmonds's Store precincts, but at no others; and a summons was issued by your honor summoning the judges at the other precincts to show cause why they had not made a return to your

honor, as the law requires, and they made out from memory, or possibly from memorandums preserved by accident, (for the ballots were in the clerk's office, and no poll was kept,) and forwarded to your honor, a statement of what they thought to be the result of the election. The ballots were returned to the clerk's office of the county court, along with ballots of the county election, not in separate sealed packages, but most of them strung on a string, not separated and not endorsed, except with the name of the clerk, and nothing to distinguish them as ballots cast upon the question of subscription to the said railway company, or from what precinct they came.

Your complainants further represent, and are advised, that the registration laws of this State provide plainly and explicitly in what manner the registration books may be purged, and names stricken therefrom which appear, by competent testimony, to be improperly thereon; and your complainants are informed, believe, and therefore charge, that the said Atlantic and Danville Railway Company, by their agents and attorneys, advertised at each of the precincts of this county, prior to the regular registration day, a list of names which it was alleged should be stricken from the registration books of the particular precinct at which the list was so published. And your complainants allege that at some of the
61 precincts the list of names so published was stricken from the registration book on the regular day of registration, or in four days thereafter, at the instance of the said railway company, their agents or attorneys, without any evidence being introduced to show that the said names so published were improperly upon the registration books, but no lists of the names so stricken from the books were published at the several precincts, as the law requires, and at other precincts, among which your complainants will mention Sunny Side, Lawrenceville, and Trotter's Store, the names so published were not stricken from the books until a few days prior to the election, and then at the instance of said railway company, their agents or attorneys, and the names so stricken off were not published as the law directs, and hence no opportunity was given for the voters to ascertain who were stricken from the books or to contest the right of the registrar to strike the names from the books. As the result of this wholesale violation of the registration law, many voters were improperly stricken from the books and denied the right to vote on the day of election, and at one precinct—Sturgeonville—so many names had been stricken from the books that were properly thereon, who applied to vote, that the judges allowed them to vote notwithstanding the fact that their names had been stricken from the old books and were not on the books which had been copied by the registrar at the request of the judge.

And your complainants further allege that after the election, and after the commissioners appointed by your honor had commenced and proceeded with count far enough to ascertain that it was very doubtful whether a sufficient number of voters had voted "for subscription" to constitute a majority of the registered voters of the

county, the said railway company, by their agents and attorneys, again made application to the registrars, and prevailed upon them to mark "removed" or "dead" or "said to be removed" or "dead," or believed to — "removed or dead," as to other names, so that the names so marked might not be counted as registered voters by the commissioners, and thus change the result of the election.

And your complainants believe, and therefore charge, that there were enough names illegally stricken from the registration books after the election to defeat the subscription.

Your complainants further represent and are advised that the board of commissioners appointed by your honor is simply a board to declare the result of the election as ascertained from the returns of the judges of election, and that they have no power to reject or refuse to count any ballot that the judges of election have returned to the clerk's office as a ballot either for or against subscription, and in ascertaining the number of registered voters they must be guided by the registration books which were used on the day of election, and that they have no right to drop names from or add to the lists of voters upon said registration books. And being so advised, they charge that the return made by the said commissioners, and entered upon the records of your honor's court, is a false return, for the following reasons:

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1st. They report, "that, having taken the oath prescribed by law, they proceeded to open the packages of ballots mentioned in said order, and to count the same," when the fact is that there were no ballots returned by the judges of election to the clerk's office, as the order requires, except from three precincts, and the rest were returned not marked so as to distinguish them as ballots upon the question of subscription, and not separated, either for or against, and not in sealed packages, as the law requires, and, under these circumstances, your complainants are advised that the said commissioners had no right to proceed with the count until they had summoned the judges of election, whose duty it was to count and separate the said ballots, and get them to perform that duty; but, instead of this, they went to work and opened all the packages of ballots presented to them as thought to be ballots upon the question of subscription, and then, not finding enough packages to correspond with the number of precincts, they requested the clerk of the court to bring before them the packages of ballots returned for the regular county election, which was done, and they proceeded, contrary to law, as your complainants are advised, to open said packages until a sufficient number of packages of ballots upon the question of subscription had been found to correspond with the number of precincts; and the way they then ascertained which were the ballots of the several precincts was by looking at the names of the voters upon the ballots, and enquiring of the by-standers what precinct they voted in. And the board were respectfully requested to note these facts upon their minutes, and they, by a vote of three to two, refused to do so; and, instead of proceeding to count the ballots, as they report, they proceeded to count such as a majority thought ought to be counted against subscription, and to throw out and not

count such as a majority thought proper not to count, although the judges of election had counted them, as appears by their returns to the judge, as against subscription.

2d. The said commissioners report the number of votes cast against subscription to be 399, when the fact is that the number of votes cast against subscription was 487, they having thrown out 88 votes against subscription without any authority of law, as
63 your complainants are advised, and the board was respectfully requested to state this fact in their report, which they refused to do by a vote of three to two.

3d. They report "that we ascertain the number of ballots cast by freeholders for subscription to be 206, and the number of ballots cast by freeholders against subscription to be 140, and that a majority of the freeholders voting upon the question were in favor of the subscription." This is a false return, for the reason that the commissioners threw out and refused to count the ballots of 88 voters who voted upon the question and voted against subscription, and these ballots the commissioners failed to examine to see whether they were cast by freeholders or non-freeholders; and your complainants believe and charge that a sufficient number of these votes illegally thrown out are freeholders to defeat the subscription. And your complainants allege that it is a false return, for the further reason that there was a ballot which had upon it E. P. P. Harwell, and upon the land book of the commissioner of the revenue was the name of Ephraim Harwell, and the commissioners decided that the ballot was the ballot of Ephraim Harwell, and counted him as a freeholder for subscription. Upon another ballot was the name of N. T. Cooper, and upon the land book of the commissioner was the name of Nathan Cooper, and they decided that the ballot was the ballot of Nathan Cooper, and counted him as a freeholder for subscription. And, on the other hand, there was a ballot upon which was written Jos. P. Weaver, and against subscription; on the land book was the name of Joshua P. Weaver, and it was shown by the commissioner of the revenue that there was but one J. P. Weaver at that precinct, but they decided that the ballot was not the ballot of Joshua P. Weaver, and refused to count him a freeholder against subscription. Upon another ballot was the name of Frank Matthews, and on the land book was the name of F. R. Matthews, and there is but one Frank Matthews at the precinct at which he voted, and they decided that the ballot was not the ballot of F. R. Matthews, and refused to count it as freeholder against subscription. And your complainants further allege that the commissioners counted Peter Beasley as a freeholder when there are two Peter Beasleys, one a freeholder and one not, when there was no evidence that the Peter Beasley voting was the land-owner. And they counted Wm. M. Wesson, T. M. Vick, R. R. Jones, Jr., and N. H. Williams as freeholders, when they do not own a foot of real estate in the county.

4th. They report that a majority of the registered voters of the county were in favor of subscription. This is also a false re-
64 turn, for the first registrar that appeared before the board

was B. J. Seymour, with the books from Sunny Side precinct, and, after he was sworn, and his books exhibited to the commissioners, the question was asked him, Which were his books that he used at the election, and he stated that he used the old books on the day of election, but had made out a new book since the election, and had left off the new book the names of a good many voters who were on the book that was used on the day of election, that were said to be removed or said to be dead, and, notwithstanding this fact, the commissioners adopted the new book as the registration book at that precinct. Then the counsel of the railroad asked that the registrar be then *be then* allowed to note opposite names upon the book, which were believed to be removed or dead, the words "removed or dead," and thereupon Thomas B. Price, one of the board, offered the following resolution: "That when a name appears on the registration book, and the registrar is satisfied that the person has removed from his district or is dead, that the registrar be requested to make a note of the fact opposite such name as a guide to the commissioners before he presented his books." This resolution was adopted by a vote of three to two, and thereupon the registrar retired and marked "removed" as to two names and "dead" as to one, and the board, by the same vote, refused to *to* count them as registered voters. The next registrar was J. J. Rawlings, at Gholsonville, and he stated that, under the resolution, he had noted two, and they were not counted; the next was Jesse A. Taylor, at Kelly's Store; he had marked opposite one name not allowed to vote because he had voted in Greensville last year, and as to the name G. D. Powell, he marked "removed," but that he had seen Powell on that day, and he had stated that he had not moved away; but the board, by a vote of three to two, refused to count either of these voters. The next was R. T. Short, the registrar from Sturgeonville, and he stated that he had noted one in obedience to the resolution, and three others had been marked out as removed since his books were copied, and none of these were counted. The next was R. R. Fraser, the registrar at Elmore's store, and he stated that he had marked out as removed five or six since the election; his books show ten marked out as removed, and they were not counted. Upon Edmonds' Store none were marked. The next was Thos. H. Coleman, the registrar at Trotter's Store precinct, and he stated that he *he* could not tell — he had marked under the resolution; his books — that he marked 27, and none of these were counted by the same vote. The next was Edw'd Drumgoole, the registrar at Drumgoole's precinct, and he was informed of the resolution by T. B. Price, and
65 requested to note as to names removed or dead, and he stated that he did not know of any who had removed, but that since the election he had gotten a letter from F. P. Wray, applying for the transfers of John Rooker and James P. Lynch, and the registrar endorsed, by request, opposite their names "said to be removed;" "June 6th, 1883." And the board, by the same vote, refused to count these names as registered voters. The next was Wm. M. Short, the registrar from Smoky Ordinary precinct, and

he stated that he marked out four names since the election, and his books show that thirteen have been marked out since his books were copied. He stated he marked out all who had not voted in some time. Nine of these names were counted by the same vote. The next was S. J. Moseley, the registrar at Tillman's precinct, and he stated, in answer to Mr. Price's question, requesting him to note certain names, as requested by the resolution, and he said he had marked "believed to be removed" as to five names, but that he could not say that they have removed. The board refused to count these names by a vote of three to two, and his books show that he had marked "removed" as to three other names which were not counted. There was another name upon the registration book at this precinct, which had endorsed opposite to it "in jail," and the board refused to count this name as a registered voter. The last precinct was Lawrenceville, and W. H. E. Merritt, the registrar, refused to comply with the resolution of the board, and would not mark as to any name, upon the ground that, if he did so, he would violate his oath as a registrar, for he thought he had no right to do anything with the books after the election that would change the result, the law providing how the books should be purged. The board then proceeded to purge the books themselves, and refused to count the name of A. W. Callis, which was upon the books, because he was thought by some of the commissioners to be dead. The name of Harrison Holmes was on the books twice, and the board refused to count the name but once, although no evidence was introduced to show that there was but one man of that name. The name of Charles Hicks was on the books twice, and the board refused to count it but once, although there was no evidence that there were not two of the same name. At this point an effort was made to get the mode of procedure of the board, but they refused to be interrupted, and declined to give their mode of procedure. They also dropped from the Lawrenceville books the name of E. P. Orgain, because the name of Eddie P. Orgain appeared upon the books at Elmore's Store, although there was no evidence that E. P. Orgain was Eddie P. Orgain.

66 The board also refused to count 18 names on the Lawrenceville registration books, because they were marked on the books as registered May 14th, 1883. A motion was then made and carried that the board look over the registration books and list of transfers, and see if the same name appeared more than once on the books of registration, and, upon examination, the name of Bolling Brown was found on the books at Tillman's and Drumgoole's; and the board refused to count the name but once, although there was no evidence that there was not a man by that name at each of the precincts. The name of Rich Powel appeared on the books at Lawrenceville and Sturgeonville, and the name was only counted once, although there was no evidence that there were not two men of that name. And your complainants represent and are advised by this mode of counting, above mentioned, the board unlawfully refused to count enough registered voters to defeat the subscription, and that there are over 3,300 tax-payers in the county, and, according to the count of commissioners, less than 3,000 registered voters.

Your complainants further represent that section 62 of chapter 61, Code of Virginia, 1873, which is referred to by your honor in the order directing the vote to be taken, provides that the order of court submitting the question of subscription to the voters of the county "shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of the total capital stock of said company, or an amount the interest upon which, at the rate authorized by the board of supervisors, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars." And your complainants represent that the capital stock of the company, as named in the charter, is $200,000.00, one-fifth of which would be $40,000, the maximum amount that the county could subscribe to the stock of the company under the statute.

They further represent that the value of all property subject to taxation in this county is, in round numbers, say $1,500,000.00; hence a tax of twenty cents on the $100.00 in this county would produce $3,000, which is the interest at six per cent., the rate named in the charter, upon $50,000.00, which would, under any circumstances, be the maximum amount that the county could subscribe. And your complainants are advised that the sum of $3,500 per mile for each mile of railway that may be constructed within the limits of the county is a sum greater, under any event, than $40,000.00, on the one hand, or $50,000.00 on the other; for — matters not how the company may run the road through the county, the distance will be greater than 20 miles. Your
67 complainants, therefore, are advised and charge that the said election was an undue election, for the further reason that the order of court, fixing the maximum amount to be subscribed at $3,500 per mile, was an improper order, and was made in violation of one of the sections of the statute referred to in the order itself, and your complainants are advised that this fact renders the election null and void.

Your complainants are further advised that as the statute declares the maximum amount the county shall subscribe, as has been shown above to be $50,000, and as the charter of the Atlantic and Danville Railway Company measures the amount to be subscribed by the number of miles of railway that may be constructed within the limits of the county, for which bonds are to be issued as each mile is constructed, and as the maximum amount fixed by the charter is greater than the maximum amount fixed by the statute, your complainants are advised that your honor cannot, under the statute, make an order fixing the maximum amount to be subscribed by the county per mile until the said company has had the proposed route surveyed, the portion of the county through which it is to run determined, and the number of miles with certainty ascertained; and your complainants give this as a reason to show that the said election was an undue election.

In view of these facts, and of the many violations of the law herein set forth, and of others not now remembered, your complainants ask that the said election may be declared by your honor to be an un-

due election, and that the returns of the commissioners may be declared to be a false return.

And as in duty bound, they will ever pray, &c.

James Jones, Thos L. Jones, W. V. Wilson, Ashby Manson, Richard Johnson, Ro. E. Haskins, S. M. Kennedy, G. E. Kennedy, M. A. Jones, Thomas F. Jones, Geo. E. Hardy, W. S. Thomas, Edward Haskins, J. H. Jones, Ch's S. Barrow, E. T. Walthall, W. L. Griffin, Henry E. Young, Thos. F. Duane, Joseph F. Gibbs, W. A. Sledge, R. H. Sharp, Jr., James Haskins, Thos. C. Haskins, T. J. Stone, G. W. Smith, Carter Haskins, A. H. Foster, R. M. Wilson, Wm. M. Howerton, R. C. Howerton, E. T. Oldham, Thomas T. Elmore, Thos. E. Howerton, Eddie P. Orgain, Nath'l Mason, Fed. Campbell, J. P. Haskins, Rob't C. Haskins, Jno. G. Claiborne, Benj. A. Haskins, W. A. Sanford, John Haskins, Jas. W. Haskins, Rob't R. Tucker, R. A. Sharp, R. Turnbull, and R. D. Turnbull,

By R. TURNBULL AND
R. D. & N. S. TURNBULL,
Their Attorneys.

68 STATE OF VIRGINIA, } *To wit:*
Brunswick County, }

This day R. D. Turnbull and R. Turnbull personally appeared before me, and made oath that the facts set forth in the foregoing complaint are true to the best of their knowledge and belief.

Given under my hand this 21st day of June, 1883.

E. R. TURNBULL,
Clerk of Brunswick County Court.

And at another day—to wit: at a court held for the county of Brunswick, at the court-house thereof, on the 26th day of June, 1883.

The judge of this court being so situated in respect to the complaint filed in the clerk's office of this court by James Haskins and others against The Atlantic and Danville Railroad Company as, in his opinion, to make it improper for him to try it, Judge Charles Alexander, of the county of Mecklenburg, was requested to preside in his place; and, on motion of the said Atlantic and Danville Railroad Company, by counsel, they are made party defendants to the said complaint filed by James Haskins and others in the clerk's office of this court on the 21st day of June, 1883, complaining of an undue election, &c., held on the 24th May, 1883, on the question of a subscription by the county of Brunswick to the said railroad company. And the complainants, also appearing by counsel, moved the court to continue this case until the next term; which motion the court overruled. And thereupon the said railroad company moved the court to quash the said complaint; and the argument of counsel not being completed, it is ordered that this case be continued till to-morrow morning at 9 o'clock.

And at another day—to wit: at a court held for the county of Brunswick, at the court-house thereof, on the 27th day of June, 1883.

James Haskins and others this day filed their amended complaint; which is in words and figures following—to wit:

To the Hon. F. E. Buford, judge of the county court of Brunswick:

By way of amendment to the petition filed in the clerk's office of your honor's court on the 21st June, 1883, to set aside the
69 election held on the fourth Thursday in May, 1883, upon the ground that it was an undue election and a false return by the commissioners appointed by your honor to count the vote, &c., your complainants most respectfully represent:

1st. They report that, having taken the oath prescribed by law, they proceeded to open the packages of ballots mentioned in said order, and to count the same, when the fact is that there were no ballots returned by the judges of election to the clerk's office, as the order requires, except from three precincts, and the rest were returned not marked so as to distinguish them as ballots upon the question of subscription, and not separated either for or against, and not in separate sealed packages, as the law requires. And, under these circumstances, your complainants are advised that the said commissioners had no right to proceed with the count until they had summoned the judges of election, whose duty it was to count and separate the said ballots, and get them to perform that duty; but, instead of this they went to work and opened all the packages of ballots presented to them as thought to be ballots upon the question of subscription, and then, not finding enough packages to correspond with the number of precincts, they requested the clerk of the court to bring before them the packages of ballots returned for the regular county election, which was done; and they proceeded, contrary to law, as your complainants — advised, to open said packages until a sufficient number of packages of ballots upon the question of subscription had been found to correspond with the number of precincts; and the way they then ascertained which were the ballots of the several precincts was by looking at the names of voters upon the ballots, and enquiring of the by-standers what precincts they voted in. And the board were respectfully requested to note these facts upon their minutes; and they, by a vote of three to two, refused to do so. And instead of proceeding to count the ballots, as they report, they proceeded to count such as a majority thought ought to be counted against subscription, and to throw out and not to count such as a majority thought proper not to count, although the judges of election had counted them, as appears by their returns to the judge, as against subscription. Enough votes were not counted to change the result of the election.

And your complainants allege that it is a false return, for the further reason that there was one ballot which had upon it E. P. P. Harwell, and upon the land book of the commissioner of the revenue was the name of Ephraim Harwell, and the commissioners decided that it was the ballot of Ephraim Harwell, and counted him as a

freeholder for subscription. Upon another ballot was the
70 name N. T. Cooper, and upon the land book of the commissioner was the name of Nathan Cooper, and — counted him as freeholder for subscription, no evidence being introduced upon either of these points. Upon another ballot was the name of Frank Matthews, and in the land book was the name of F. R. Matthews; and there is but — Frank Matthews or F. R. Matthews at the precinct at which he voted, and they decided that the ballot was not the ballot of F. R. Matthews, and refused to count it as a freeholder against subscription.

And your petitioners therefore pray that the said election, for these reasons, may be declared to be null and void.

And, as in duty bound, they will ever pray, &c.

James Haskins, C. W. Smith, R. M. Wesson, E. T. Oldham, Eddie P. Orgain, J. P. Haskins, Benj. Haskins, James W. Haskins, Thos. L. Jones, Richard Johnson, G. E. Kennedy, Thos. F. Jones, Edward Haskins, E. T. Walthall, Thos. T. Duane, R. H. Sharp, Jr., Thos C. Haskins, Carter Haskins, Wm. W. Howerton, Thos. T. Elmore, Nath'l Mason, Rob't C. Haskins, W. A. Sanford, Rob't R. Tucker, W. V. Wilson, Rob't E. Haskins, M. A. Jones, Geo. E. Hardy, J. H. Jones, W. L. Griffin, Jos. F. Gibbs, R. H. Sharp, T. J. Stone, A. H. Foster, R. C. Howerton, Thos. E. Howerton, Fed. Campbell, John G. Claiborne, John Haskins, James Jones, Ashbey Manson, S. M. Kennedy, R. A. Jones, W. S. Thomas, Ch's S. Barrow, H. E. Young, W. A. Sledge,

By R. TURNBULL,
Their Attorney.

R. TURNBULL.
R. D. TURNBULL.

STATE OF VIRGINIA, *Brunswick County,* } *To wit:*

This day R. D. Turnbull and R. Turnbull personally appeared before me and made oath that the facts set forth in the foregoing amended complaint are true to the best of their knowledge and belief.

Given under my hand this 27th day of June, 1883.

E. R. TURNBULL,
Clerk Brunswick County Court.

And now at this day—to wit: at a court held for the county of Brunswick, at the court-house, on Wednesday, the 27th day of June, 1883.

71 This day came the parties, by their attorneys, and the attorney for the complainants asked leave to file an amended petition, which was objected to by the counsel for the railway company, but the court overruled the objection and allowed the amended petition to be fi*e*ld; which was done accordingly. And the arguments of counsel having been completed, it is ordered that the said complaint be quashed, and that the defendants recover against the complainants their costs by them about their defence in this behalf

expended. And the complainants, by counsel, tendered two bills of exceptions to the rulings of the court in this case, and prayed the court to sign and seal the same, which the court refused to do, upon the ground that its decision in this case is final.

(The foregoing exhibit was not certified to.)

Exhibit "B," mentioned in the answer of the defendants, was not found in the paper.

A copy of the record.

Teste: CHAS. E. MAY, *Clerk.*

Clerk's fee for copy, $20.

Teste: CHAS. E. MAY, *Clerk.*

I hereby certify that the notice required by sec. 3457, Code of 1887, has been given.

CHAS. E. MAY, *Clerk.*"

72 And now, at this day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Thursday, February 18th, 1892—

Came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. It is therefore decreed and ordered that the same be affirmed, and that the appellants pay to the appellees thirty dollars damages, and also their costs by them about their defence herein expended.

Which is ordered to be certified to the said circuit court of the county of Brunswick.

A true transcript of the record.

Teste: GEO. K. TAYLOR, *C. C.*

The following is a copy of the opinion of the court referred — in foregoing order:

73 *Opinion.*

LACY, *J.:*

This is an appeal from a decree of the circuit court of Brunswick county, rendered on the 26th day of February, 1890. The bill was filed by the appellants in the said court on the 25th day of March, 1889, against the board of supervisors of Brunswick county and their successors in office to enjoin them from issuing the bonds of the county of Brunswick as a subscription to the Atlantic & Danville Railroad Company thereafter, and to enjoin and restrain the said "The Atlantic & Danville Railroad Company" from disposing or parting with the bonds of the said county, theretofore issued in subscription to the said corporation, and now in the hands of and in the possession of the said company, the said plaintiffs suing on behalf of themselves and all others, tax-payers of the said county of Brunswick, who will make themselves parties to this suit and

contribute to the costs of the same, the county bonds in question having been issued and to be issued by virtue of an act of the General Assembly of Virginia, entitled "An act to incorporate the Atlantic & Danville Narrow Gauge Railroad Company, approved April 21, 1882." The railway authorized to be constructed and operated under this act of assembly was to have its eastern terminus at the most available point at deep water on James river within the county of Surry, and its western terminus at a point at or near the town of Danville, its line to pass through or near the town of Waverly, in the county of Sussex; thence by the most direct and practicable route to a point at or near the town of Belfield, in the county of Greensville; thence by the most practicable route to a point at or near Brunswick court-house; thence by the most practicable route to a point at or near the town of Boydton, in the county of Mecklenburg, and thence by the most practicable route to its terminus. By virtue of its charter and the general laws of the State upon the subject, the said corporation made an application to the county court of Brunswick county to take the sense of the qualified voters of the said county upon the question of making a subscription to the said corporation by the said county, and on the 29th day of March, 1883, an order was rendered by the said court directing the question to be submitted to the qualified voters of said county on the fourth
74 Thursday in May, 1883, which election was held, and the commissioners appointed to canvass the returns reported to the court that the election had been carried in the manner prescribed by the law, which fact was certified to the said board of supervisors, and a subscription was made of $3,500 per mile of the main line which should be constructed within the limits of the said county, and an agent appointed to make the subscription on the books of the company in due form, and bonds were issued for subscription to the said company for five miles of said road at $3,500, and the said corporation is constructing a road of standard gauge; and application has recently been made to the said board of supervisors to issue bonds to the said company for four miles of additional railroad, claimed to have been constructed in the said county, at $3,500 per mile, and such application is now pending before the said board of supervisors.

The bill alleges that the said subscription is illegal and void, and that the further issue should be enjoined; that the election aforesaid was illegal and void; that the voters who voted for the subscription were induced to do so by fraudulent representation on the part of the then president and vice-president; that the Meherrin river divides the county into two parts, one on the north and the other on the south of said river, and the voters resident in these sections were severally persuaded—the voters on the north side that the road would be constructed on the north side, and the voters on the south side, on the other hand, that it would be constructed on the south side of the river; that the said election was void for other reasons; that the voters did not vote understandingly, and the election was not properly conducted; that the said election, for these

irregularities, was contested before the county court upon the petition of citizens, as required by law, and dismissed by the county court without passing upon the merits, and that the subscription was void because the order under which it was conducted did not state the maximum amount to be voted for, but only the rate per mile; that the act of assembly incorporating the said railroad was unconstitutional and void, because the law embraced more than one object, and because the objects of the act are not expressed in the title, as required by section 15, art. V, of the constitution of Virginia; that the act is also void, being repugnant to the 12th, 14th, and 15th sections of art. X of the Virginia constitution, that a State cannot authorize one of its subdivisions to do what the State has not the power and authority to do as a whole; that the requisite amount of $50,000 has not been subscribed, nor the 5 per centum thereof paid up by persons other than railroad and internal improvement companies, and the corporation has no legal existence; that the requisite amount of $20,000 has not been deposited with the
75 treasurer of the Commonwealth as required by the act of incorporation; that the subscription of $3,500 per mile is greatly in excess of the amount in the aggregate allowed by law for the subscription, being in excess of twenty cents upon every one hundred dollars in value of the property of the county assessed for taxes; that the subscription on the part of the county of Brunswick, as alleged, was upon a narrow-gauge railroad, whereas, subsequently, the corporation has procured an amendment to its charter, and is, accordingly, now a standard-gauge road, which, being more expensive to construct, has destroyed the value of the county stock; and it (the said corporation) was authorized by the said amendment also to construct a branch road to Portsmouth or Norfolk, on Elizabeth river, without the consent or knowledge of the said county, and to build piers, wharfs, storehouses, &c., in connection with its said railroad, and Portsmouth had voted a subscription of $150,000, and is constructing its road in violation of its original charter from Portsmouth to Danville; that the said company has mortgaged its road in the sum of $16,000 per mile; that the cars are hired from car-trust companies, and that the road is being constructed in the most careless and negligent manner, and the bonds of the road held by the county are not worth twenty-five cents on the dollar, and are daily diminishing in value, and will soon be worthless. The injunction prayed for was awarded according to the prayer of the bill.

The defendant railroad company demurred and answered, and denied the allegations of the bill as to the illegality of the election, and responded that that question had been heard and determined in the mode prescribed by law, and could not be here again inquired into, and denied that any fraudulent practices on their part had been in anywise employed; that the railroad had been built in the usual and proper mode, and by lawful authority; that the gauge of the road had been changed by act of assembly.

In reply to all of the allegations of the bill that the county court failed to state the maximum amount proposed to be subscribed, as required by section 62 of chapter 61 of the Code, that the act of in-

corporation was void as repugnant to the constitution of the State; that the subscription is void, because in excess of the amount allowed by law, averred that all these questions have been settled adversely to the complainant in this court by the late case of Taylor *v.* The Board of Supervisors of Greensville County, 86 Va., 506 (13 Va. L. J., 802), where the same questions were raised as to this charter; admitted the mortgage alleged to have been placed on the road by the bill, but denied the right of the complainants to object to that, they not being members of the corporation in any way.

76 The circuit court, coming to consider the case upon the bill and exhibits, demurrer and answer and exhibits, dismissed the bill, and the complainants appealed to this court, where errors are assigned according to the allegations of the bill.

The case of Taylor *v.* The Board of Supervisors of Greensville County, *supra*, was a controversy arising concerning this same railroad in its construction through the county of Greensville; the identical questions raised here were raised there as to the irregularities of the organization and the subscription of that county, and especially the excess of the subscription in the aggregate, when computing it at the sum of $3,500 per mile, as compared to the provisions of the general law, as set forth in section 62 of chapter 61 of the Code of 1873. But Judge Hinton sufficiently disposes of this objection and apparent difficulty by pointing out that the proceedings here were by virtue of a special act of assembly upon this very subject, passed not only subsequently to the code, but enacted to govern this particular case. The questions raised as to the election are considered and disposed of there, and furnish reasons satisfactory as to this case.

As to the amendments to the charter, the question is not considered, as the amendments had not been acted upon by the company. But we perceive no difficulty upon that subject, the said amendments having been now acted upon. We are of opinion that the regulations concerning this work of internal improvement are subjects without the proper control and supervision of the legislature; and, when the county of Brunswick subscribed to this road, it, and all the citizens thereof, must be taken to have acted with reference to the fact that the charter was liable to amendment and change, as occasion should require, under the general law. It does not so appear by the record here, but in argument it is conceded, and there is filed with the briefs a written agreement arrived at between the parties in this case, by which, after the decision of this court in the case of Taylor *v.* Board of Supervisors, *supra*, the parties compromised their dispute herein, as of February 24, 1890, by which "this suit was to be dismissed, and the county bonds issued at once, bearing interest, as before, from date, the railroad to give up to the county in bonds $3,500." Two days after, on the 26th of the said February, 1890, the decree complained of was entered in accordance with this agreement and the suit dismissed, but no consent appears as endorsed upon the decree. The bonds of the county were thereupon issued, no person appearing to further object, and they were put upon the market and sold, and are now in the hands

of third persons for value. Subsequently this appeal is taken, and the objection made that the charter of this company is void, because repugnant to the constitution of Virginia, which provides that "no law shall embrace more than one object, which
77 shall be expressed in its title," all the other questions appearing to have been expressly considered, as stated already in the case of Taylor *v.* Board of Supervisors of Greensville County. And it is claimed, in support of that contention, that the constitution is violated here in this regard, because the act embraces more than one object, and because only one object appears in the title, and the act has more than one. Article V, section 15, of the constitution of Virginia provides that "no law shall embrace more than one object, which shall be expressed in its title." There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number, but the framers of the constitution meant to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass it. Sun Mut. Ins. Co. *v.* Mayer, &c., 8 N. Y., 253; People *v.* Mehaney, 13 Mich., 494. That neither the members of the legislature nor the people should be misled by the title. And, as has been said, the intent of this provision of the constitution was to prevent the union, in the same act of incongruous matters and of objects having no connection and no relation. And with this it was designed to prevent surprise in legislation by having matter of one nature embraced in a bill whose title expressed another. State *v.* County Judge of Davis County, 2 Iowa, 282.

And Judge Cooley says that it may be assumed as settled that the purpose of these provisions was—first, to prevent hodge-podge or log-rolling legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted, and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire. The general purpose of these provisions is accomplished where a law has but one general object, which is fairly indicated by its title.

To require every end and every means necessary or convenient for the accomplishment of the general object, to be provided for by a separate act, relating to that alone, would not only be unreasonable, but would actually render legislation impossible. Thus an act entitled an act to provide a charter for a city or town would, by such title, give notice that many details were of necessity embraced in the body of the act, not specially mentioned in the title, and an act to incorporate a railroad company would be expected,
78 without other title, to provide for the manner of taking subscriptions to the stock. The generality of a title is no objection to it, so long as it is not made a cover for legislation incon-

gruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection.

An act to incorporate a railroad company may authorize counties to subscribe to its stock, or otherwise aid the construction of the road, which has been held under a constitution which requires the law to contain but one object and matters properly connected therewith (Gabbert *v.* Railroad Co., 11 Ind., 365), and also where the law was simply required to embrace but one object. Guilford *v.* Cornell, 18 Barb., 640.

We are of opinion that the act in question, having for its object the incorporation of a railroad company, embraced only such objects as were connected with and in furtherance of the main general object of the act; that in such an act it should be provided that subscriptions to stock should be taken, and prescribe the mode was to be expected, and was indeed suggested by the general object, because railroads are built in that way and can be built, generally speaking, in no other way. That counties should be authorized to subscribe is neither unusual nor incongruous. Such provisions are very common, and not incongruous, because in aid and furtherance of the general object.

For the foregoing reasons, without going into a general examination of the numerous cited cases on the subject, we are of opinion that the law in question is not repugnant to the clause of our constitution cited above. And, for the reasons stated, we are of opinion that the amendments effected in the charter did not render it void, nor injuriously affect the rights of the appellant, and for the reasons stated in the opinion of Judge Hinton, in Taylor *v.* Supervisors, &c., *supra*. On all other questions we are of opinion to affirm the decree appealed from. Decree affirmed.

Teste: GEO. K. TAYLOR, *C. C.*

The following note of argument and assignment of errors was filed by the appellants on the 12th day of November, 1891, more than ten days before the argument of said cause began in accordance with rule number two of said court:

78*a* POWELL *et als.* *vs.* SUPERVISORS OF BRUNSWICK COUNTY, &c. } D. M. 51 X.

From the circuit court of Brunswick county.

79 In the Supreme Court of Appeals of Virginia, Richmond.

POWELL *et als.* *vs.* SUPERVISORS OF BRUNSWICK COUNTY, &c.

(*Supplemental Brief by E. P. Buford, for Appellants.*)

To the honorable judges of the supreme court of appeals of Virginia:

In addition to the errors already assigned by the appellants in

their petition for the appeal and supersedeas, they assign the following further errors in the decree complained of:

(7.) Section 9 of the charter of the Atlantic and Danville Railway Company, purports to authorize the county of Brunswick to subscribe to the capital stock of said railway company "according to the forms prescribed by the code of Virginia of 1873;" which "forms" are set forth in sections 62, 63 and 64 of chapter 61. And by "the forms" and manner of making such subscription as provided in said sections, the property-owners of said county are deprived of their property "without due process of law," and said sections are therefore in conflict with amendment 14 of the Constitution of the United States.

Section 62 provides that "the county court may make an order requiring the sheriff and commissioners of election, at the next general election for State, county or township officers, or at any other time not less than thirty days from the date of said
80 order, which shall be designated therein, to open a poll and take the sense of the qualified voters on the question, whether the board of supervisors shall subscribe to the stock of any internal improvement company," etc. But neither in this section nor elsewhere is there any provision requiring notice of such election to be given to the voters.

The manifest object of sections 63 and 64, if they are not open to the objection made in the next assignment of error, is to provide a mode of ascertaining judicially whether the vote required to authorize the subscription was or was not cast. The condition upon which the county is authorized to subscribe is that "three-fifths of the qualified voters of the county voting upon the question, are in favor of subscription, and that said three-fifths include a majority of the votes cast by freeholders at such election, and a majority of the registered voters of the county," and hence there must be some mode of ascertaining these facts, and for that purpose judicial action is necessary. *In re* M'Pherson (N. Y.) 10 N. E. Rep., 688. And the objection made to these sections is, that they provide for this judicial action (or rather ought to provide), but do not provide for any notice to the tax-payers or any hearing or opportunity to be heard thereon. "The right of the property-owner to have notice, and to be heard before his property can be taken, or before a burden can be imposed upon it must be provided for at some proper stage of the proceedings, and an enactment which attempts to justify a tax or assessment without making such provision is un-versally regarded as an infringement of the Constitution." Whiteford Tp. *vs.* Probate Judge, 53 Mich., 130; Campbell *vs.* Dwiggins, 83 Ind., 473; Tyler *vs.* State, *id.*, 563; Mayor & Co. *vs.* Scharf, 54 Md., 499; Ulman *vs.* City of Baltimore, (Md.) 20 Alt., Rep., 144; Kuastz *vs.* Sumpton, (Ind.) 19 N. E., Rep., 474; Murdock *vs.* City of Cincinnati, 39 Fed., 891; Hutson *vs.* Woodbride Protection Dist., (Col.) 16 Pac., 549; Same *vs.* Same, 21 Pac., 435; Spencer *vs.* Merchant, 8 S. Ct., Rep., 921; Stuart *vs.* Palmer, 74 N. Y., 184; Railroad Tax Case, 8 Saw. Cir. Ct., 238, 13 Fed., 723; Hagar *vs.* District No. 108, 111 U. S., 701; People *vs.* O'Brien, (N. Y.) 18 N. E., Rep., 105. See also *In re* Mc-

Pherson *supra*, a case in which, the statute was sustained on the ground of the sufficiency of notice and opportunity to be heard. This case arose under the New York laws imposing a succession tax on legacies and collateral inheritances, and Earl, J., delivering the opinion of the court, said: "This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the tax-payer becomes finally fixed. He must have some kind of notice of the proceeding against him, and a hearing or an opportunity to be heard in reference to the
81 value of his property and the amount of the tax which is thus to be imposed. Unless he has these his constitutional right to due process of law has been invaded." See also Fries *vs.* Brier, 11 N. E., Rep., 958.

It will be observed that this right to notice and hearing is a right guaranteed to the property-owners whose property is to be burdened with the tax, and notice and opportunity to be heard are essential to give a judicial proceeding the character of "due process of law." And it is insisted that by a judicial proceeding alone can it be constitutionally ascertained that there has been a compliance with the condition upon which the subscription is authorized. "And by 'due process of law' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. * * * It must give to the parties to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process of law. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form. If life and liberty are involved there must be a regular course of judicial proceedings; so, also, where title or possession of property are in contention. * * * And whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding." Railroad Tax Case, 13 Fed., 723.

It is true that by an act approved January 15th, 1875, (Sessions

Acts 1874–'5, page 29) it is provided that "the returns of said election or decision of the voters shall be subject to the inquiry, determination and judgment of the court of the county in which the sense of the qualified voters was thus taken, upon the written complaint of fifteen or more of the qualified voters of the county, of an undue election or false returns," which, in order to be valid must be filed within thirty days after the election. But this act
82 does not cure the defects suggested in this and the following assignment of error, for these four reasons:

First. Because this act was not passed at the time of, and as a part of the law contained in these sections of the code. It was passed long after. The validity or invalidity of these sections was fixed at the moment of their enactment. And if the objections made to them are well taken, they are void—mere nullities *ab initio*. And being void at the time of the passage of this, they derived no efficacy from the act. The passage of the act did not give them life. Their status as nullities remained unchanged.

Second. Because the act provides no notice. There must be "some kind of notice," by some mode of publication, of the pendency of the matter in court, and the requisites of a valid complaint, and the right to be heard positively required by the statute. "The legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice. It is not enough that the property-owner may, by chance, have notice, or that he may, as a matter of favor, have a hearing, the law must require notice and give a right to a hearing. So, also, it is immaterial that" the proceedings under an act which does not require notice and give a right to a hearing, have in fact been fair and correct. "The constitutional validity of the act is to be tested, not by what has been, but by what may be done under it." Stuart *vs.* Palmer, 74 N. Y., 183.

Third. Because the privilege of being heard even upon the legality of the election and returns, is expressly limited to fifteen or more qualified voters, instead of being given to all the tax-payers of the county. However fraudulent may be the election and however false may be the returns, the act only opens the doors of the court to qualified voters, and to them only upon the condition that "fifteen or more" join in the complaint. The right to be heard, under any circumstances whatever, is by the provisions of this act absolutely denied to all other property-owners of the county together with fourteen qualified voters, just as by the provisions of the code it is denied to all the property-owners and tax-payers, whether qualified voters or not. By the laws of this State women, whether married or sole, may acquire and hold taxable property of all kinds. So, also, may men who, for the various causes of disability and disfranchisement, are not qualified voters. And in point of fact a large portion of the taxable property is owned by such persons. And these persons are entitled to all the privileges of litigation for the protection of their property that may be exercised by qualified voters.

By virtue of being "qualified voters," the qualified voters of the

county determine the propriety of authorizing the subscription. But by virtue of being tax-payers, all the tax-payers of the county are entitled to be heard on the question whether the qualified voters have authorized the subscription. A vote in
83 favor of subscription entails upon the tax-payers of the county the burden of paying the public debt thereby incurred, which debt is to be collected in the summary manner provided for the collection of taxes—without hearing and without judgment. On the question, therefore, whether the requisite vote was cast, each tax-payer, regardless of his qualifications as voter, is entitled to be heard. In consequence of this vote the property of the tax-payers is taken and transferred to the holders of the county bonds. But before there can be such taking and transfer, it is insisted that each tax-payer must have the opportunity to be heard. This is not a tax for a governmental purpose, of the expediency and occasion for levying which the legislature is the exclusive judge. It is a tax levied to discharge a debt growing out of a private contract between the county and the railroad company, which contract the legislature has conditionally empowered the county to enter into. To ascertain whether this condition has been fulfilled judicial action is necessary. "To ascertain that a deed is conditional, that there has been a breach of the condition, and to enforce a forfeiture for the breach, are judicial functions, which it is not within the competency of legislative power to exercise." Board of Education *vs.* Bakeville (Ill.), 10 N. E., 384. But a judicial proceeding without notice to parties and an opportunity to be heard is a paradox. It is not "due process of law."

Fourth. Because this act only purports to make "the returns of the election or decision of the voters" subject to the inquiry, determination and judgment of the court of the county; it does not make the report of the board of commissioners appointed under section 63 of chapter 61, Code 1873, to count the ballots, &c., subject to such inquiry, determination and judgment. This report by section 63 is directed to be entered on the order book of the court, and by section 64 is made the basis of the order of court requiring the supervisors to make the subscription, and not only is there no notice and opportunity to be heard on this report given to the tax-payers, but the court itself is vested with no authority to enquire into the correctness of the report. "If it shall appear by the report of the board of commissioners" that the requisite vote has been cast in favor of subscription "the county court shall, at its next session, enter an order requiring the supervisors of the county to attend on a day and at a place named in the order to carry out the wishes of the voters as expressed at said election." This is the legislative mandate to the court. According to the statute, over this report neither the tax-payer nor the court can exercise the slighest control. It is insisted that the statute in order to provide due process of law and to avoid being a legislative assumption of judicial power ought to provide that after the report has been entered on the order book of the court, an order shall be entered di-

recting the tax-payers to show cause, if any they can, against
84 the confirmation of the report, and if no sufficient cause be shown that the order to the supervisors be entered; leaving to the court full discretion in passing upon the sufficiency of the cause, and requiring the order directing cause to be shown to be sufficiently promulgated, by some mode of publication, to apprise the tax-payers of their opportunity to be heard. By this or a similar provision alone can the proceeding be invested with the character of "due process of law." The legislature cannot, without invading the province of the court, assume that the report of the board of commissioners expresses "the wishes of the voters as expressed at the election." Through mistake or fraud the report may express the opposite. It is for the court to determine upon a full hearing of the railroad company and the tax-payers whether or not the report does express the wishes of the voters. It is believed that no other single instance can be cited in which a court is required to adopt and confirm a report of its commissioners without extending to parties interested the right to except and be heard, and without the power to exercise any judicial discretion in reference to its adoption and confirmation, the reason being that commissioners are a mere agency to inform the court, and not being judicial officers, cannot be clothed with judicial power. State *vs.* Johnson, 5 N. E. Rep., 555.

This report is not the election and not the return. Yet the complaint must allege an undue election or false return, otherwise this act does not authorize it to be made. It may be that the election is proper and the return is true, *non constat* the report of the commissioner may be erroneous through mistake or fraud. Section 63 contemplates a variance between the report and the return, for it authorizes the commissioners to "correct the return if needed." Who can assume the correctness of the commissioners' corrections? But the right of complaint is limited expressly to an undue election and false return, notwithstanding there is no more reason to assume that the board of commissioners will be less guilty of mistake or fraud than the judges of election, and notwithstanding the report may, in contemplation of the statute, be completely different from the returns made by the judges of election, for by the statute the commissioners are vested with plenary power to change all the returns under pretext of correcting.

(8.) As already anticipated, said sections 63 and 64 are an assumption by the legislature of powers and functions strictly and essentially judicial in their nature, and therefore in contravention of art. II of the constitution of Virginia, which provides that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others." And all acts done by the county court and supervisors of said county under authority sup-
85 posed to be conferred by said sections are *ultra vires* and void.

The matters involved in the determination whether or not the condition upon which the subscription is authorized has been

complied with, necessitate judicial action. It is equally clear that by these sections the legislature has stripped the court of every attribute properly appertaining to the judiciary department and constituted it a ministerial functionary to carry into execution the judgment rendered by the legislature itself. Section 63 requires the report of the board of commissioners to be entered upon the order book of the court, and section 64 provides that: "If it shall appear, by the report of the board of commissioners, that three-fifths of the qualified voters of the county, voting upon the question, are in favor of subscription, and that said three-fifths include a majority of the votes cast by freeholders at such election, and a majority of the registered voters of the county, the county court shall, at its next session enter of record an order requiring the supervisors of the county to attend on a day and at a place designated in the order, to carry out the wishes of the voters, as expressed at said election." Now just here may it be asked, who decides that the report of the commissioners sets forth the wishes of the voters as expressed at the election? Is it the judgment of the court or the judgment of the legislature? The statute gives the court neither the means, power or possibility of rendering any decision. The legislature has obviously stripped the court of all judicial powers, and has by its own enactment decided that if the commissioners report in favor of subscription the report necessarily expresses the wishes of the voters.

It will be observed, however, that by this enactment the legislature directly reaches the property of the tax-payers. The tax-payers are deprived of their property without trial or judgment, by a simple mandate of the legislature. No judicial action is interposed between the law and the taking of the property of the citizens. Judge Cooley, citing the case of Newland *vs.* Marsh, 19 Ill., 372, says: "The legislative power extends only to the making of laws. * * * It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts, for to do so would be the exercise of a power which belongs to another branch of the Government, and is forbidden to the legislative." Const. Lim. (3 edition) 91.

"On the other hand, to adjudicate upon, and protect, the rights and interests of individual citizens, and, to that end, to construe and apply the laws, is the peculiar province of the judicial department." *Id.*

In the case of Merrill *vs.* Sherburne, 1 N. H., 204, which arose under the New Hampshire constitution, Woodbury, J., after
86 stating that the judiciary is the department of Government which, it was intended, should interpret and administer the laws, said: "On general principles, therefore, those inquiries, deliberations, orders and decrees, which are peculiar to such a department, must, in their nature, be judicial acts. Nor can they be both judicial and *and* legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the

latter make rules upon which, in connection with the constitution, those decisions should be founded." In further support of this assignment of error, the court is referred to the following authorities: Roche *vs.* Waters, (Md.) 18 Atl. Rep., 866; Same *vs.* Same, 19 Atl. Rep., 535; City of Jamesville *vs.* Carpenter, (Wis.) 46 N. W., 158; Vaughan *vs.* Harp, (Ark.) 4 S. W. Rep., 751; Quintini *vs.* City of Bay St. Louis, 1 So. Rep., 625; *In re* Splane, (Penn.) 16 Atl., 481; Houston *vs.* Williams, 13 Cal., 25; Board of Education *vs.* Bakeville, 10 N. E., 384; *In re* Pacific Railway Comn., 32 Fed., 241; Ervinis' Appeal, 16 Penn. St., 266; Greenough *vs.* Greenough, 11 Penn. St., 394; Dechastellux *vs.* Fairchild, 15 Penn. St., 18; Trustees, &c., *vs.* Baily, 10 Fla., 238; Cincinnati, &c., *vs.* Commissioners, &c., 1 Ohio, U. S., 81; King *vs.* Dedham Bank, 15 Mass., 454; Gordan *vs.* Ingraham, 1 Grant's Cases, 152; People *vs.* Supervisors of New York, 16 N. Y., 432; Beebe *vs.* State, 6 Ind., 515; Taylor *vs.* Place, 4 R. I., 324; State *vs.* Adams, 44 Mo., 570.

The inquiry directed by these sections, it is insisted, is in its nature necessarily judicial. It must be either legislative or judicial. It cannot be both. Merrill *vs.* Sherburne, *supra*. If legislative, the legislature "cannot make the court its instrument in conducting mere legislative investigations." *In re* Pacific Railway Comn., 32 Fed., 241. If judicial, which it is, the legislature has invaded the province of the court, exercised all the judicial functions and rendered the judgment.

Respectfully submitted.

E. P. BUFORD,
Attorney for the Appellants.

Lawrenceville, Va., Sept. 25th, 1891.

A true transcript from the record.
Teste: GEO. K. TAYLOR, *C. C.*

87 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record in the case lately pending in said court in which R. S. Powell and others were appellants and The Atlantic and Danville Railway Company and the Supervisors of Brunswick County were appellees.

Seal Supreme Court of Appeals of Virginia, Richmond.

In testimony whereof I hereto set my hand and annex the seal of said court this 22d day of February, 1893.

GEO. K. TAYLOR,
Clerk of Supreme Court of Appeals of Virginia, at Richmond.

88 To the Honorable L. L. Lewis, president of the supreme court of appeals of Virginia:

Your petitioners, R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W.

Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, citizens and tax-payers of the county of Brunswick and State of Virginia, who sue for and on behalf of themselves and all other citizens and tax-payers of the said county of Brunswick, respectfully represent that they are aggrieved by a final decree of the supreme court of appeals of Virginia, rendered on the 18th day of February, 1892, in a certain suit in chancery the style of which is Powell *et als. vs.* The Supervisors of Brunswick County *et als.*, and in which your petitioners were appellants and the supervisors of Brunswick county, technically called the "board of supervisors," and the Atlantic & Danville Railway Company, a corporation chartered by the laws of Virginia, were appellees.

The said decree of the supreme court of appeals of Virginia affirmed a decree of the circuit court of the said county of Brunswick, by which your petitioners are also aggrieved.

A transcript of the record of the decree complained of is herewith presented, from which it appears that your petitioners claimed rights,
privileges, and immunities under the Constitution of the
89 United States and guaranteed to them by the said Constitution; that the decision of the Federal questions so presented to the said supreme court of appeals was necessary to the determination of the said suit; that the said Federal questions were actually decided by the said supreme court of appeals, and that the decision of the said supreme court of appeals was against the said rights, privileges, and immunities so claimed by your petitioners under the Constitution of the United States. (See Transcript of Record, MS., p. 79 *et seq.*)

To avoid repetition your petitioners refer to their petition, presented to the said supreme court of appeals, for an appeal from the said decree of the said circuit court, which petition is at page 1 of the said transcript, for a statement of the object of the said suit and the proceedings therein in the said circuit court.

Your petitioners also state that the laws of the State of Virginia under which the supposed subscription by the county of Brunswick was made to the capital stock of the said Atlantic & Danville Railway Company are in sections 9 and 10 of an act of the General Assembly of Virginia incorporating the said railway company; in section 62, 63, 64, and 65 of chapter 61 of the Code of Virginia of 1873, and in an act of the General Assembly of Virginia approved on the 15th day of January, 1875; all of which laws are given as appendices to this petition.

Your petitioners are advised that the said subscription is
90 void because the said laws of the State of Virginia purporting to authorize the same to be made are repugnant to the 14th amendment of the Constitution of the United States, and that the decree of the supreme court of appeals of Virginia is erroneous for the following reasons:

1. Because said section 62 of chapter 61 of the Code of Virginia of 1873 deprives your petitioners of their property "without due process of law."

2. Because said section 63 of chapter 61 of the Code deprives your petitioners of their property "without due process of law."

3. Because said section 64 of chapter 61 of the Code deprives your petitioners of their property "without due process of law."

4. Because said section 64 also violates art. 11 of the constitution of Virginia, being a legislative assumption of judicial power, and since this violation of the Virginia constitution involves a deprivation of property "without due process of law" it presents a Federal question.

5. Because the act of January 15th, 1875, deprives your petitioners of their property "without due process of law."

6. Because the act of January 15th, 1875, also denies to the tax-payers who are not qualified voters and to each tax-payer individually "the equal protection of the laws."

7. Because section 10 of the act incorporating the Atlantic & Danville Railway Company deprives your petitioners of their property "without due process of law."

Your petitioners further state that the board of supervisors
91 of the county of Brunswick is composed of H. E. Young, T. T. Elmore, I. B. Williams, R. R. Seymour, and R. H. Whittaker, all of whom are resident citizens of the said county.

Your petitioners, in order that the said decree of the said supreme court of appeals of Virginia may be reviewed by the Supreme Court of the United States, pray your honor to award them a writ of error to the decree aforesaid from the Supreme Court of the United States, in pursuance of the act of Congress in such case made and provided.

And your petitioners further pray your honor to certify to the said Supreme Court of the United States that the Federal questions presented in the foregoing assignment of errors were duly assigned by your petitioners and argued in the said supreme court of appeals of Virginia (the said supreme court of appeals being the highest court of law or equity in the State of Virginia in which a decision can be had in the said suit), and that the decision of the said Federal questions was necessary to the determination of the said suit and were actually decided by the said supreme court of appeals of Virginia.

Respectfully submitted.

R. S. POWELL,
W. H. BARROW,
THOMAS BRANCH,
W. H. VALENTINE,
J. W. BAILEY,
N. M. NEBLETT,
S. J. MOSELY,
92 R. W. EANES,
E. R. JOHNSON,
J. R. MANSON,
HENRY TUCKER,
STERLING J. WALLACE,
EDWARD BARROW,
THOMAS F. JONES,
D. O. TURNER,
By E. P. BUFORD, *Their Attorney.*

VIRGINIA, *To wit:*

On the foregoing petition of R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Mosely, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, appellants in the chancery suit of Powell *et als. vs.* The Supervisors of Brunswick County *et als.*, a writ of error from the Supreme Court of the United States is awarded them to the decree of the supreme court of appeals of Virginia, rendered on the 18th day of February, 1892, in the said suit, and which is complained of in the said petition, upon the petitioners or some one for them entering into bond, with good security, in the penalty of $500.00 and with condition as the law directs.

And it is ordered that the record of said suit be certified to the said Supreme Court of the United States for examination and review.

93 And it is certified that the Federal questions presented by the assignment of errors in the foregoing petition were duly raised by the assignments of errors made and argued by the petitioners in the said supreme court of appeals (the said supreme court of appeals being the highest court of law and equity in the State of Virginia in which a decision can be had in the said suit), and that the decision of the said Federal questions was necessary to the determination of the said suit and were actually decided by the said supreme court of appeals of Virginia.

The petition aforesaid, together with this order and certificate, are certified to the clerk of the Supreme Court of the United States, at Washington.

In witness whereof I, L. L. Lewis, president of the supreme court of appeals of Virginia, have set my hand this the 25th day of November, in the year 1892.

L. L. LEWIS.

94 APPENDIX 1.

Sessions Acts 1881–'2, page- 468–'9, chapter 95.

"An act to incorporate the Atlantic and Danville Narrow Gauge Railroad Company.

(9.) The following counties through which the said railway shall be constructed, to wit, Brunswick, Greensville, Mecklenburg, Surry, and Sussex, are hereby authorized to subscribe, according to the forms prescribed by the code of Virginia of eighteen hundred and seventy-three, to the capital stock of the said Atlantic and Danville Railway Company, to an amount not exceeding thirty-five hundred dollars per mile, for each and every mile of railroad the said company may construct within the limits of the said counties respectively: Provided that no part of said subscription made by any of the said counties shall be due or payable until it shall be certified that one mile or more of the said railroad shall have been graded,

and the track laid thereon in accordance with the provisions of the tenth section of this act.

(10.) That it shall be the duty of the county courts of the several counties named in the preceding sections of this act at the request of the said railway company, or the board of supervisors of any of the said counties, to appoint a commissioner, who, after the commencement of the work of construction in the county, by the said company, shall report to the county court, upon each court day, the number of miles of railroad which the said company has graded and laid the track thereon. Said report shall be certified at
95 once to the board of supervisors of the county, and thereupon the said board of supervisors shall issue or cause to be issued and deliver to the said railway company, bonds of the county bearing interest not exceeding six per centum per annum, of such denominations as the said railway company may desire in payment for said subscription for every mile of railroad which, by said report, appears to be graded, and to have the track substantially laid thereon. The compensation of said commissioners shall be fixed by the courts appointing the same, and shall be paid by the Atlantic and Danville Railway Company."

Appendix 2.

Code of Virginia, 1873, chapter 61, page 593.

"Of subscriptions by counties, cities, and towns to works of internal improvements; how to be submitted to vote of the people.

(62.) The county court of any county, or the common council, or board of trustees, of any city or town, or township board of any township, in this Commonwealth, may make an order requiring the sheriff or sergeant, and commissioners of election, at the next general election for State, city, town or county, or township officers, or at any other time, not less than thirty days from the date of said order, which shall be designated therein, to open a poll, and take the sense of the qualified voters, on the question, whether the board of supervisors, council, or board of trustees, or township board, shall subscribe to the stock of any internal improvement company,
96 named in the order, which has been incorporated by the General Assembly. The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of the total capital stock of said company, or an amount, the interest upon which, at the rate authorized by the council, or board of trustees, of any city or town, or board of supervisors of any county or township board of any township, shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars: Provided, that the bonds issued by any county, city or town, or township, subscribed to an internal improvement company, shall be received by such company at their par value.

63. The commissioners of election who, if there be none otherwise legally appointed, shall be designated in the order authoriz-

ing the vote, after taking an oath faithfully to discharge the duty assigned to them, shall open polls at the various places of voting in the said county, city or town, or township, designated in the order, and at the time therein designated, and shall conduct such election, and close the polls in such manner as is provided by law in other elections, and at said election each qualified voter who shall approve such subscription, shall deposit a ticket or ballot, on which shall be written or printed, the words 'For subscription,' and each voter who shall oppose said subscription, shall deposit a ticket or ballot, whereon shall be written or printed, Against subscription., and each ballot shall be endorsed with the name of the voter, which
97 shall be inspected by the officer or officers conducting the elections at the respective voting places. The commissioners of election at the several places of voting shall immediately after the closing of the polls at each said place, count the ballots deposited, and shall within two days after said election, make return to the judge of the county court, or to the president or other presiding officer of the council or board of trustees, of the city or towns, of the number of votes cast for and the number of votes cast against subscription, and shall return to and deposit with the clerk of said court, council or board of trustees, in separate sealed packages, the ballots for and against subscription. And the said judge, president or presiding officer shall appoint four citizens of the county, city, or town or township, who, with the clerk aforesaid, shall constitute a board of commissioners, whose duty it shall be, within two days thereafter, to meet at the office of said clerk and, having taken an oath before said clerk faithfully to discharge their duty, open the said packages of ballots, count the same, correct the return if needed and ascertain and report how many of the said ballots were cast by freeholders and how many by non-freeholders for and against subscription respectively, which said report, signed by a majority of said board, shall be entered on the order book or other proper record book of said court, council or board of trustees.

64. If it shall appear, by the report of the board of commissioners that three-fifths of the qualified voters of the county, city, or
98 town, or township, voting upon the question are in favor of subscription, and that said three-fifths includes a majority of the votes cast by freeholders at such election, and a majority of the registered voters of the county, city, or town, or township, the county court, council or board of trustees shall at its next session, enter of record an order requiring the supervisors of the county, or the members of the council, or board of trustees, or of the township board, to attend on a day and at a place named in the order, to carry out the wishes of the voters as expressed at said election.

If subscription be voted for, how it is to be made and how payments secured by loans; levy therefor.

65. If a majority of the whole number of supervisors, or councilmen, or trustees, or township board, be not present at the time and place so designated, they shall adjourn from time to time until

a majority shall be present, when they shall determine what amount of the capital stock, not exceeding the maximum aforesaid, shall be subscribed for on behalf of the county, city, or town, or township, and shall enter of record the amount so agreed upon, and thereupon shall appoint an agent or agents to make the subscription; which subscription shall be paid in such instalments as may be agreed upon by said board, council or trustees, or township board, or as may be called for by the company."

Appendix 3.

Sessions Acts 1874–'5, page 29, chapter 37.

An act providing for contests and determination thereof in elections held to take the sense of qualified voters on subscriptions to stock of internal improvement companies.

1. Be it enacted by the General Assembly of Virginia, That whenever the sense of the qualified voters of any county, city or town shall be taken on the question whether the board of supervisors, council or board of trustees of any county, city or town shall subscribe to the stock of any internal improvement company, as now provided by law, the returns of said election or the decision of the voters shall be subject to the inquiry, determination and judgment of the respective county and corporation courts, or of the county courts, in which the sense of the qualified voters was thus taken, upon the written complaint of fifteen or more of the qualified voters of the county or corporation, of an undue election or false return, two of whom shall take an oath or affirmation that the facts set forth in such complaint are true, to the best of their knowledge and belief; and the courts shall, in judging of elections and decisions, proceed*ing* upon the merits thereof, and shall determine concerning the same according to the constitution and laws of this State; and such complaint shall not be valid, or regarded by the court, unless the same shall have been filed within thirty days after the said election, in the clerk's office of the proper courts. The corporation named in the order authorizing the sense of the qualified voters to be taken as aforesaid shall be summoned and be made a party defendant to the proceeding herein authorized, or may become defendants on their own motion; and after such summons, or after notice to said corporation of the filing of said complaint (which summons or notice must be given and executed in the mode prescribed by law), either party shall be at liberty to proceed to take all proper depositions to sustain or invalidate such election or complaint, upon reasonable notice to the adverse party, or to any three of the complainants, and the defendants; and the court shall proceed at the next term after the defendants shall be notified or summoned to determine the contests, without a jury, on evidence written or oral, and on the papers filed, unless good cause be shown for a continuance, and shall make a proper record of such determination and judgment.

101 [Endorsed:] Powell *et als. vs.* The Supervisors of Brunswick County *et als.* Petition for writ of error and order awarding the writ.

102 UNITED STATES OF AMERICA, *ss:*

To the supervisors of Brunswick county, technically called the board of supervisors, and the Atlantic and Danville Railway Company, a corporation chartered by the laws of Virginia, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 23rd day in February next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the Commonwealth of Virginia, wherein R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, citizens and tax-payers of the county of Brunswick and State of Virginia, who sue for and on behalf of themselves and all other citizens and tax-payers of said county, plaintiffs, and you are defendants, to show cause, if any there be, why the judgment rendered against the said plaintiffs should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable L. L. Lewis, president of the supreme court of appeals of Virginia, this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

L. L. LEWIS,
President Supreme Court of Appeals of Virginia.

103 [Endorsed:] Service accepted for the Atlantic & Danville Railway Co. Feb. 9th, 1893. Rich'd Walke, counsel.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

On this 22nd day of February, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared E. P. Buford before me, the subscriber, H. M. Tyler, a notary public within and for the city of Richmond, in the State of Virginia, and makes oath *the* he delivered a true copy of the within citation to H. E. Young, chairman of the board of supervisors of Brunswick Co., Va., and T. T. Elmore, R. R. Seymour, I. B. Williams, and R. H. Whitaker, members of the said board of supervisors of said Brunswick Co., Va., in their county of Brunswick.

Sworn to and subscribed the 22nd day of February, A. D. 1893. Given under my hand and official seal.

[Seal H. M. Tyler, Notary Public, Richmond, Va.]

H. M. TYLER,
N. P., Richmond, Va.

STATE OF VIRGINIA, } *To wit:*
City of Richmond, }

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the foregoing citation is on file in my office.

Given under my hand this 22d day of February, 1893.

GEO. K. TAYLOR,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court — appeals of the Commonwealth of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in said suit between R. S. Powell, W. H. Barrow, Thomas Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thomas F. Jones, and D. O. Turner, citizens and tax-payers of the county of Brunswick and State of Virginia, who sue for and on behalf of themselves and all other citizens and tax-payers of the said county of Brunswick, plaintiffs and appellants, and The Supervisors of Brunswick County, technically called the "Board of Supervisors," and The Atlantic and Danville Railroad Company, a corporation chartered by the laws of Virginia, defendants and appellees, wherein was drawn in question the validity of a statute of said State of Virginia on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the said R. S. Powell, W. H. Barrow, Thos. Branch, W. H. Valentine, J. W. Bailey, N. M. Neblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling
J. Wallace, Edward Barrow, Thos. F. Jones, and D. O.
105 Turner, citizens and tax-payers of the county of Brunswick and State of Virginia, who sue as aforesaid, as by their complaint appears—

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of February next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 30th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

106 In the clerk's office of the supreme court of appeals of Virginia.

FEBRUARY 22D, 1893.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ is on file in my office.

Given under my hand this 22d day of February, 1893.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

107 Know all men by these presents that we, R. P. Buford, as principal, and E. P. Buford, as surety, are held and firmly bound unto the Atlantic & Danville Railway Company and the Board of Supervisors of Brunswick County, of the State of Virginia, in the full and just sum of five hundred dollars, to be paid to the said Atlantic and Danville Railway Company and the said Board of Supervisors of Brunswick County, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a supreme court of appeals of the State of Virginia, in a suit depending in said court between R. S. Powell, W. H. Barrow, Thos. Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thos. F. Jones, and D. O. Turner, appellants, and the said Board of Supervisors of Brunswick County and The Atlantic and Danville Railway Company, appellees, a judgment was rendered against the said R. S. Powell, W. H. Barrow, Thos. Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thos. F. Jones, and D. O. Turner, and the said R. S. Powell, W. H. Barrow, Thos. Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thos. F. Jones, and D. O. Turner having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Atlantic and Danville Railway

Company and the Board of Supervisors of Brunswick County, citing and admonishing them to be and appear at a United States Supreme Court to be holden at Washington on the day in the said citation mentioned:

Now, the condition of the above obligation is such that if the said R. S. Powell, W. H. Barrow, Thos. Branch, W. H. Valentine, J. W. Bailey, N. M. Niblett, S. J. Moseley, R. W. Eanes, E. R. Johnson, J. R. Manson, Henry Tucker, Sterling J. Wallace, Edward Barrow, Thos. F. Jones, and D. O. Turner shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

R. P. BUFORD. [SEAL.]
E. P. BUFORD. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
L. L. LEWIS,
President of the Supreme Court of Appeals of Virginia.

VIRGINIA:

In the clerk's office of the supreme court of appeals of Virginia, at Richmond.

FEBRUARY 22, 1893.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the within is a true copy of a bond, the original of which is on file in my office.

Given under my hand this 22d day of February, 1893.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

108 In the Supreme Court of the United States.

POWELL *et als.*
vs.
THE SUPERVISORS OF BRUNSWICK COUNTY and THE ATLANTIC AND DANVILLE RAILWAY COMPANY.
} Agreement of Parties.

To Jas. H. McKenney, clerk of the Supreme Court of the United States:

The parties to the above-entitled cause hereby agree that the portion hereinafter mentioned of the printed record of the said cause for the supreme court of appeals of Virginia shall not be printed as a part of the transcript for the consideration of the Supreme Court of the United States, to wit, that portion of the petition for appeal presented to the said supreme court of appeals of Virginia com-

mencing at line 27 on page 4 of said printed record and ending at line 22 on page 30 of said printed record, inclusive.

You are therefore requested to omit said portion in having the transcript printed for the Supreme Court of the United States.

THE PLAINTIFFS IN ERROR,
By E. P. BUFORD, *Their Attorney.*
F. D. McKENNEY, *For P. E.*
THE BOARD OF SUPERVISORS, BRUNSWICK CO.,
By H. E. YOUNG, *Chairman.*
ATLANTIC & DANVILLE RAILWAY CO.,
By RICHARD WALKE, *Counsel.*

[Endorsed:] 1298, 15268. Powell *et als. v.* The Supervisors of Brunswick county and The A & D. Railway Co. Agreement of parties.

109 [Endorsed:] Case No. 15,268. Supreme Court U. S., October term, 1893. Term No., 898. R. S. Powell *et al.*, P. E., *vs.* The Supervisors of Brunswick Co., &c. Stipulation to omit portion of record in printing. Filed Apr. 22, 1893.

Endorsed on cover: Case No. 15,268. Virginia supreme court of appeals. Term No., 898. R. S. Powell, W. H. Barrow, Thomas Branch, *et al.*, plaintiffs in error, *vs.* The Supervisors of Brunswick County, technically called The Board of Supervisors, and The Atlantic & Danville Railway Company. Filed February 23rd, 1893.

SUPREME COURT OF THE UNITED STATES.

No. 898.—October Term, 1893.

R. S. Powell, W. H. Barrow, Thomas Branch et al., Plaintiff's in Error,

vs.

The Supervisors of Brunswick County, technically called "The Board of Supervisors," and the Atlantic and Danville Railway Company.

In error to the Supreme Court of Appeals of the State of Virginia.

Petition for Rehearing.

To the Honorable Justices of the Supreme Court of the United States:

The plaintiffs in error respectfully petition the court to grant them a re-hearing of the judgment of the court rendered on the 4th day of December 1893, whereby the writ of error previously awarded them by the president of the Supreme Court of Appeals of Virginia, was dismissed for want of jurisdiction of this court to review the decision of the said Supreme Court of Appeals of Virginia.

This petition is filed with the less reluctance because it is believed that the decision of the Court of Appeals of Virginia in the case of Taylor v. Supervisors, 86 Va., 506, and not a decision of this court, operated most strongly in producing the conclusion reached by this court; and it is respectfully submitted that undue importance was attached to the language in Taylor v. Supervisors—language loosely and inaccurately used, which, in its unnecessary generalities, is self-contradictory and states propositions totally irreconcilable with the facts in that case, and which has been *over-ruled* by the Court of Appeals in the case at bar.

The following propositions are respectfully submitted as warranted by the previous decisions of this court and the decision in this case:

1. The sufficient pleading of the essential facts together the public character of the legislation involved, which the State courts know officially, warranted the presentation of the Federal ques-

tions, to the consideration of the State court. The question is: Is there sufficient evidence, that these Federal questions were actually presented to the State court to be considered, and was it necessary for the State court to consider them in order to arrive at the conclusion reached?

2. In determining this question, it is not essential that the Federal right should be claimed *in terms* in the pleadings in the trial court, and especially when it is purely a *question of law*. Nor is it essential, for obvious reasons, that the opinion of the State court should mention the claim of Federal rights. This court has frequently taken jurisdiction where *facts* only were pleaded, and the Federal right arose from a public law applicable to the facts pleaded, upon the ground that there was sufficient evidence *outside* the pleadings and opinion of the State court, to show that the Federal right was claimed and was necessary to be considered. Wilson &c. v. Blackbird Creek &c. Co., 2 Pet 245-250; Armstrong v. Treasurer of Athens Co., 16 Pet. 281-286; Chicago Life Ins. Co., v. Needles, 113 U. S., 574-579; Eureka Lake &c. Co. v. Superior Court &c., 116 U. S., 410; Kau Kauna Co. v. Green Bay &c. Canal Co., 142 U. S, 254-269.

3. The only possible evidence, outside the pleadings and adjudication of the State court, must consist in the assignment of errors made in accordance with the rules of the State court, and the certificate of the presiding Judge.

Rule No. 2. of the Court of Appeals (see pages 42-3 of brief) prescribes the manner of assigning errors to be considered. This rule was complied with in the assignment of errors based upon the Federal rights claimed to be violated by sections 62, 63 and 64 of chapter 61, Code 1873, and the Act of January 15, 1875, by filing the printed brief and assignment of errors. See record pages 43-50.

A brief assigning errors in accordance with this rule, being the prescribed mode of claiming rights, becomes *part of the record* of the State court in the same manner as the assignment of errors in the "petitition in error"—or, at any rate, authoritative evidence of the rights claimed. It is certified as part of the record. See page 50 of record.

The certificate of the president of the Court of Appeals therefore does not *originate* the Federal questions; but only affirms that they were duly raised, as *evidenced* by the assignment of errors and were necessary to the decision of the case and were actually decided.

The opinion of this court also concedes that the decision of the Court of Appeals is broad enough to cover the Federal questions.

The portion of the decision of this court in the case at bar, which, it is respectfully submitted, should be re-considered, is that, based upon the authority of Taylor v. Supervisors 86 Va., 506, holding that the Court of Appeals has decided that sections 62, 63, and 64 of chapter 61, Code 1873, do not apply.

In the case of Taylor v. Supervisors, there was no question raised in any manner as to sections 63 and 64. The only point as to section 62, was whether the order for the election to vote upon

the subscription should conform to the clause in section 62 providing: "The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed &c.,"—the order in that case conforming in this respect to section 9 of the charter and submitting the question of subscription of $3,500 per mile without stating the "maximum amount," and without reference to the limit prescribed by section 62. This was the single question.

Your honors will observe that in the case of Taylor v. Supervisors there was an election under section 62 modified to the extent above stated by section 9 of the charter, and the proceedings under sections 63 and 64; that the decision of the Court of Appeals, in that case, recognized the necessity for the election proceedings; that the election could not be held except as prescribed in these sections of the Code changed only to the extent above stated by section 9 of the charter; that sections 65 and 66 of chapter 61 of the Code have no meaning if separated from the preceeding sections; and that the unnecessary *dictum* as to section 65 and 66 is wholly erroneous.

The Court of Appeals, having had its attention called to the irreconcelable statements in the case of Taylor v. Supervisors, by its decision in this case corrected all of thse inaccuracies. The attention of the court is specially called to the language of the Court of Appeals in the case at bar, at pages 708–9 of 88 Va. Reports and at page 39 of the record, where it is distinctly declared that the proceedings (record 16–19) are by virtue of the charter of the railway company and the "*general laws of the State upon the subject.*" It is also stated that by virtue of the charter and the "general laws" the application was made "to take the sense of the qualified voters on the question of making a subscription" and the other objectionable proceedings were had.

It thus appears that in this, the latest decision of the Court of Appeals, the proceedings are in exact compliance with sections 9 of the charter and 62, 63, and 64 of chapter 61 of the Code, and these proceedings are declared to be by virtue of the railway company's charter and "the general laws of the State upon the subject."

The Court of Appeals therefore regarded these sections as involved in the decision, as certified by the President of the court.

For these reasons a rehearing is respectfully asked for, together with the privilege of an oral argument.

No injury or inconvenience can result to the bond-holders as there is no *supersedeas* or suspending order.

THE PLAINTIFFS IN ERROR.
By E. P. BUFORD, Their Attorney.

I hereby certify that in my opinion the foregoing petition for rehearing should be granted, and the judgment of the court rendered on the 4th day of December 1893, should be re-considered.

E P. BUFORD, An Attorney and
Counsellor of the Supreme Court of the United States.

Office Supreme Court U. S.
FILED.
NOV 20 1893
JAMES H. McKENNEY,
CLERK.

150-433

RECORD, CASE NO. 15,268.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No., 898.

R. S. POWELL ET ALS.

v.

THE SUPERVISORS OF BRUNSWICK COUNTY AND THE ATLANTIC & DANVILLE RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF E P BUFORD, *COUNSEL FOR THE PLAINTIFFS IN ERROR.*

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In the Supreme Court of the United States.

R. S. POWELL ET ALS.

v.

THE SUPERVISORS OF BRUNSWICK COUNTY AND THE ATLANTIC & DANVILLE RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINJA.

BRIEF OF **E. P. BUFORD,** *COUNSEL FOR THE PLAINTIFFS IN ERROR.*

I.

STATEMENT OF THE CASE.

This is a suit in equity by fifteen tax-payers of the county of Brunswick and state of Virginia, against the Board of Supervisors of the county and the Atlantic and Danville Railway Company.

From the transcript of the record it appears:

That at the March term 1883 of the county court of Brunswick county, on the application of the railway company made pursuant to $10 of the Act of the General Assembly of Virginia, incorporating the railway company, the county court, in accordance with §§62 and 63 of chapter 61 of the Code of Virginia of 1873, ordered that the several judges of election at each of the voting precincts in the county, at the next general election—to wit, on the 24th day of May 1883—open a poll and take the sense of the qualified voters on the question whether the board of supervisors of the county should subscribe to the capital stock of the rail-

way company the sum of $3,500 per mile for each mile of railroad within the county which should be graded and the track laid thereon in accordance with the provisions of said act of incorporation, (see record pages 7 and 16); that an election was held in obedience to said order on the day named therein (see record page 7); that on the 26th day of May 1883, the judge of the county court in vacation appointed four persons, who, with the clerk of said court, should constitute a board of commissioners to ascertain and report whether the requisite vote in favor of subscription had been cast (see record pages 7 and 17); that this board of commissioners reported that the vote was in favor of subscription, and on the 27th day of June 1883 the county court entered an order requiring the board of supervisors to meet at Lawrenceville, the county-seat, on the 3rd day of July 1883 to carry into effect the wishes of the voters as expressed at said election (see record pages 7, 17 and 18); that the board of supervisors met on the day named in said order and appointed agents to make the subscription on behalf of the county (see record pages 7, 18 and 19); that previous to the subscription, on the 21st day of June 1883, a number of qualified voters of the county filed their complaint in writing denying that the vote was in favor of subscription, which complaint the county court *quashed*, without passing upon the merits, and dismissed for want of jurisdiction, for reasons hereafter pointed out (see record pages 9, 27 and 37); that at the time of the institution of this suit bonds of the county amounting to $17,500 had been issued and delivered to the railway company in part payment of the subscription, and an application for a further issue was then pending before the board of supervisors (see record page 7).

This suit was instituted in the circuit court of the county.

Its object is to injoin the board of supervisors from making a further issue and delivery of bonds in payment of said subscription, from levying a tax to pay the issue of $17,500 already made, and from doing any other act whereby the county might become a subscriber to the capital stock of the railway company; and also to obtain an adjudication that the said subscription and bonds issued in pursuance thereof are void (see record page 15).

The bill was filed March 25th 1889, several years having elapsed before the building of the road was commenced. A temporary injunction was awarded on *exparte* application, two days before the bill was filed (see record pages 5 and 19).

The railway company demurred to, and answered, the bill (see record pages 21 and 27). And thereupon the suit came on to be heard, by consent of parties, on the 26th day of February 1890, in the vacation of the circuit court. On consideration whereof the court, being of opinion that the plaintiffs had failed to show any case entitling them to relief in equity, dissolved the injunction and dismissd the bill (see record pages 20 and 21)

On the 17th day of February 1891 the plaintiffs in error obtained from the Supreme Court of Appeals of Virginia an appeal and *supersedeas* to this decree of the circuit court (see record pages 1 and 5). and on the 12th day of November 1891, several months before the argument began, in accordance with rule No. 2 of the court, filed an assignment of errors, in which it is contended that the laws of Virginia, which purport to authorize the subscription, are repugnant to the 14th Amendment of the Constitution of the United States (see record pages 43 and 50).

On the 18th day of February 1892, the Supreme Court of Appeals, by a decree rendered on that day, affirmed the decree of the circuit court, for reasons stated in the opinion filed (see record pages 38 and 43).

The case is in this court on a writ of error awarded by the Hon. L. L. Lewis, president of the Supreme Court of Appeals in pursuance of the Act of Congress, together with a certificate "that the Federal questions presented by the assignment of errors in the foregoing petition (the petition for the writ of error presented to him) were duly raised by the assignment of errors made and argued by the petitioners (the plaintiffs in error) in the said Supreme Court of Appeals—the said Supreme Court of Appeals being the highest court of law and equity in the State of Virginia in which a decision can be had in said suit—and that the decision of the said Federal questions was necessary to the determination of said suit and (they) were actually decided by said Supreme Court of Appeals of Virginia," the decision being against the rights, privileges and immunities claimed by the plaintiffs in error

under the Constitution of the United States (see record pages 50 and 53.)

Numerous objections have been made in the State courts to the validity of this subscription and of the bonds issued in payment thereof, many of which are within the exclusive jurisdiction of the State courts, and need not be stated. Those objections which are based upon conflicts between the Constitution of the United States and the laws of the State of Virginia, by supposed authority of which the subscription has been made, are alone presented to this court, as only proper subjects for its jurisdiction.

These laws are contained in §§ 9 and 10 of the Act of the General Assembly of Virginia incorporating the Atlantic and Danville Railway Company approved April 21st, 1882; in §§ 62, 63, 64 and 65 of chapter 61 of the Code of Virginia of 1873; and in an Act of the General Assembly of Virginia approved on the 15th day of January 1875. They are at pages 53 and 56 of the record, and are also given as appendices 1, 2, and 3 hereto.

II.

SPECIFICATION OF ERRORS.

The said subscription is void because the said laws of the State of Virginia purporting to authorize the same to be made are repugnant to the 14th Amendment of the Constitution of the United States, and the decree of the Supreme Court of Appeals of Virginia is erroneous, for the following reasons:

1. Section 62 of chapter 61 of the Code of Virginia of 1873 deprives the tax-payers of their property "without due process of law," because it provides for an election which is the basis of deprivation of property, but requires no notice of the election to be given to the voters.

2. Section 63 of the Code deprives the tax-payers of their property "without due process of law," because it provides for the appointment of a board of commissioners to ascertain *judicially* the result of said election, but gives no notice to the tax-payers and gives them no hearing or opportunity to be heard.

3. Section 64 of the Code deprives the tax-payers of their property "without due process of law," because it provides for a proceeding upon the report of the board of commis-

sioners, in the county court, but gives no notice to the tax-payers and gives them no hearing or opportunity to be heard.

4. Section 64 also, by making the report of the board of commissioners *conclusive*, is a legislative assumption of judicial power, and is not "due process of law."

5. The Act of January 15th 1875 deprives the tax-payers of their property "without due process of law," because it provides no adequate mode of contesting the validity of the election and the truth of the report of the board of commissioners.

6. The Act of January 15th 1875 also, by giving the right to contest the "election" and "returns" to *fifteen or more qualified voters* collectively only, denies to the *tax-payers* who are *not* qualified voters, and to each single tax-payer, whether a qualified voter or not, the "equal protection of the laws."

7. Section 10 of the Act incorporating the Railway Company deprives the tax-payers of their property "without due process of law," because it provides for an ascertainment of the number of miles of railroad constructed within the county, and the manner of its construction—and consequently for an ascertainment of the *amount of the tax* to be imposed—but gives to the taxpayers no notice and no hearing or opportunity to be heard.

III.

WHAT CONSTITUTES "DUE PROCESS OF LAW" WHEN AHPLIED TO TAXATION?

It was intimated by counsel for the Railway Company, in their argument that the Government's necessity for revenue overshadows and, to some extent, excludes the individual's right to "due process of law" when his property is taken under the form of taxation.

To this there are two replies:

1. It is not true. The constitutional provision for "due process of law" applies to taxation as well as to every mode of deprivation of property. The State can no more dispense with the essential elements of "due process of law" in the imposition of taxes than in suits between individuals or in prosecutions for crimes. The necessity for revenue justifies an application of the constitutional requirement adapted

to the particular nature of the taking of property involved in the legitimate imposition and enforcement of taxation. But under whatever form the individual is deprived of his property—whether as a punishment for crime or in private suits, or by the right of eminent domain, or by taxation, or otherwise—there must be "such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley's Const. Lim. (6th ed.) 434.

Black's Law Dictionary, 399.

2. As appears from the assignment of errors, the contention for the plaintiffs in error is that they were denied their constitutional rights in the proceedings before the subscription was made and bonds were issued, and, consequently, before any necessity for taxation existed.

The theory which prevailed in the Court of Appeals of Virginia when the case was there is not revealed. The meagre language of the opinion "upon all other questions the court is of opinion to affirm the decree," discloses nothing as to reasons. It was, however, unofficially stated by the learned Judge who delivered the opinion, that "due process of law" consists in mere conformity of proceedings to the statutory requirements, without regard to the character of the statutory requirements.

It is respectfully submitted that this also is incorrect. It removes the restraint of the constitution from State legislation.

"Law of the land means due process of law according to the common, rather than to the provisions of the statute, law."

"And since every *enactment* is not necessarily the 'law of the land,' particularly when it may chance to be a special statute addressed to the rights of an individual or a locality, the phrase 'due process of law' has a general meaning, covering with impartial equality the *civil* rights of all the citizens.' "

Ordronaux's Const. Legislation, 631—255.

"Everything which may pass under the *form of enactment* is not therefore to be considered the law of the land. * * *

The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'"

Cooley's Const. Lim. (6th ed.) 431–2.

In this case, therefore, it is not sufficient to say that the proceedings have been in compliance with the statutes. *The statutes themselves must contain the essential elements of due process of law.*

Statutes which undertake to impose a tax or assessment *must*, if there is or ought to be any judicial or *quasi* judicial inquiry as to the *right to impose the tax* or as to the *amount of the tax to be imposed*, give to the tax-payers, who are to be affected by the tax, *notice of the proceeding and a hearing or opportunity to be heard, at some proper stage of the proceeding before the tax becomes effectual.*

This is believed to be the *consensus* of all the authorities. It is the settled doctrine of this court.

Chicago &c., Railway Co. v. Minnesota, 134 U.S., 457.

In the case of Murdock v. Cincinnati, 39 Fed., 891, it is held: "A special assessment, without notice to the property-owner, and an opportunity to be heard, is wanting in 'due process of law,' though neither the city nor the State laws require such notice, and its enforcement will be enjoined."

See also Scott v. City of Toledo, 36 Fed., 385.

In Boorman et als. v. City of Santa Barbara, 65 Cal., 313, it is held that "an act authorizing street improvements which does not provide for notice of the proceedings to the parties to be assessed for the expense is unconstitutional and void."

In the case of Butler v. Supervisors of Saginaw County, 26 Mich., 22, which involved questions under an act of Michigan authorizing drainage, and empowering the board of supervisors to apportion the expense among the townships, in their discretion, benefitted, Judge Cooley said: "The

power to tax is indeed plenary; but taxation implies public interest; and, in cases like these now in question, it also implies proceedings *in pais*, in some of which the tax-payers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative."

In Patton v. Green, 13 Cal., 325, Baldwin, J., says: "We think it would be a dengerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of such power."

In re Trustees of N. Y. Prot. Epis. Pub. School, 31 N Y., 574, Judge Denio says: "It is manifestly proper that the tax-payers should have notice of the imposition proposed to be levied upon them, and an opportunity for making suggestions and explanations to the proper administrative board or office."

In Ireland v. Rochester, 51 Barb., 414, Judge Smith, speaking of the imposition of assessments says: "It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. It is a plain principle of justice, applicable to all judicial proceedings, that no person should be condemned unheard, or shall suffer judgment against him, without an opportunity to be heard." And he says that an act assessing persons without notice transcends the power of the Legislature, and is itself void.

"It is a fundamental rule that in all judicial or *quasi* judicial proceedings, *whereby the citizen may be deprived of his property* he shall have notice, and an opportunity to be heard, before the proceeding can become effectual."

In re Ford, 6 Lans., 92.

"The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding against his property, and that in some form he may be heard, if wrong is apprehended, before any portion of his property is seized for the support of government."

Overing v. Foote, 65 N. Y., 265.

Judge Cooley, in his Work on Taxation, at pages 265-'6

says: "In such proceedings it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him. We should say that notice of the proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law.'"

"Unless he has these, his constitutional right to 'due process of law' has been invaded.'"

In re McPherson, 10 N. E. Rep., 688.

"The right of the property-owner to have notice and to be heard before his property can be taken, or before a burden can be imposed upon it, must be provided for at some proper stage of the proceedings; and an enactment which attempts to justify a tax or assessment without making such provision is universally regarded as an infringement of the constitution."

Whiteford Township v. Probate Judge, 53 Mich., 130.

"Notice, or, at least, the means of knowledge, is an essential element of every just proceeding which affects the rights of persons or property."

Philadelphia v. Miller, 49 Penn. St., 440.

"The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against the person without a hearing. It is a rule, founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defence of his rights; and the constitutional provision that no person shall be deprived of these without 'due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation on arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of life, liberty, or property. This the Legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or execu-

tive in its nature."

"This guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"No case, it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments. * * * It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense as the judgment debtor is deprived of his by the judgment."

Stuart v. Palmer, 74 N. Y., 184.

In the Railroad Tax Case, 13 Fed., 723. Mr. Justice Field, speaking of 'due process of law' as applying to taxation, said: "And by 'due process of law' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. * * * It must give to the parties to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process of law. If it touched life and liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is in the same clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law—by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceedings in any case; it may be given by personal citation, and in some cases it may be

given by statute; but, given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so also where title or possession of property is in contention. * * * And whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of 'due process of law.' Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding." In the case of Underwood v. McVeigh, 23 Gratt, 418, Judge Christian says: "The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way."

See also the opinion of Judge Staples in Boggs v. The Commonwealth, 76 Va., 989.

Counsel for the Railway Company cited the cases of Davidson v. New Orleans, 96 U. S., 97, and Hagar v. Reclamation District, 111 U. S., 701, as opposing the position of the plaintiffs in error. Certainly there is nothing in these cases opposing, and they are strongly relied upon by the plaintiffs in error as sustaining their position.

In both cases the acts brought in question are sustained for the simple and obvious reason that they expressly provided that the tax imposed could only be enforced by a suit in court, after due notice to the tax-payer, in which he could assert every possible defense to the imposition.

In the latter case Mr. Justice Field declares the general principle that the tax-payers are entitled to have notice and be heard whenever, in the imposition of the tax or the ascertainment of its amount, there is an "inquiry into the weight of evidence or other element of a judicial nature," and also that the right to notice and hearing "may depend upon the character of the tax and the manner in which its amount is determinable."

See also 1 Desty. on Taxation, 597–8.

Let us now consider the several Virginia statutes *seriatim*, and, first, with reference to "the character of the tax" which they impose.

If the propositions hitherto stated are true, and the authorities hitherto cited correctly present the constitutional rights of tax-payers in ordinary instances of taxation, in which all rights and matters of defense remain unimpaired between the tax-payer and the taxing power, they are *a fortori* true in the case at bar.

In this case the statutes contemplate the issuance and delivery of negotiable bonds, and the imposition of taxes to pay such bonds.

In ordinary instances of taxation for governmental purposes, the government acquires no right to compel the citizen to pay illegal taxes by pleading the doctrine of *estoppel* against the citizen's right to assert his defense. Yet if taxes are imposed, for the most necessary purpose of government, in violation of the constitutional right of the citizen to have notice and a hearing "at some proper stage of the proceeding," and "before the proceeding becomes effectual," the tax is void.

In the case at bar as soon as the negotiable bonds are issued and go into hands of *bona fide* holders, the tax-payer loses every right to resist the tax upon grounds of defense based upon matters of fact, such as that there was not the requisite vote in favor of subscription, the road was not constructed as required by law, etc.

The decision of this court in the case of Claiborne County v. Brooks, 111 U. S., 400–406, rests upon this principle.

The "proper stage" therefore, at which the tax-payers of the county of Brunswick should have had notice of the proceeding to impose this tax upon them and an opportunity to resist, was at sometime before the subscription was made and the bonds were issued.

The statutes, however, provide no such notice and opportunity before or after.

And this failure of the statutes is the ground upon which their validity is questioned in this court.

IV.

SECTION 62 OF CHAPTER 61 OF THE CODE OF 1873.

Section 62 of chapter 61 of the Code of 1873, empowers the county court to "make an order requiring the sheriff and commissioners of election, at the next general election, * * * or at any other time, not less than thirty days

from the date of said order, which shall be designated therein, to open a poll and take the sense of the qualified voters on the question whether the board of supervisors shall subscribe to the stock of any internal improvement company."

No notice of the election is required by this section. Neither does the order of court require notice (see record pages 16 and 17, "Exhibit 1 filed with bill").

"An election held without notice to the voters is void; but the notice may be given by the law itself. Where the time and place are fixed by the law itself, all the voters must take notice of it. When the time and place are to be fixed by some authority, the failure to give notice will render the election a nullity."

6 Am. and Eng. Encyc. of Law, 297–8.

The election provided for by section 62 is a special election, the time of holding which is not fixed by law. Notice, therefore, is essential to its validity.

Whatever is necessary to constitute a valid election must be prescribed by the legislature. "An election cannot take place without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power, and through legislative enactment, and the legislature must provide for and regulate the conduct of an election, or there can be none."

McCrary on Elections, 129, §121.

McCune v. Weller, 11 Cal., 49.

The statute must require notice to be given to the voters, by positive provision, not leave them to obtain notice by chance or the caprice of officers.

Stuart v. Palmer. 74 N. Y., 183.

Boggs v. Commonwealth, 76 Va., 989.

Santa Clara County v. So. Pacific R'y Co., 18 Fed., 429.

Hibbard v. People, 4 Mich., 125.

The result of the election might have been different if proper notice had been given to the voters.

"The right to levy a local tax may be made to depend upon the vote of the district, and the exercise of this right is under the control of the legislature. The power to levy may be conditioned that it be authorized by a vote of the legal electors of the district to be charged with the amount

to be raised by the assessment. Notice of the meeting to vote the tax must be given, and this is material to the validity of the election."

2 Desty on Taxation, 1121, § 170.

See also page 1126.

V.

SECTION 63 OF CHAPTER 61 OF THE CODE OF 1873.

The manifest object of this section is to provide a mode of ascertaining *judicially* the result of the election—whether or not the vote required to authorize the subscription was cast.

The objection made to this section is that it provides for this judicial inquiry, but gives no notice to the tax-payers, and gives them no hearing or opportunity to be heard.

This section, after providing for the holding of the election and making the returns, requires the Judge of the county to "appoint four citizens of the county, who, with the clerk, shall constitue a board of commissioners, whose duty it shall be, within two days thereafter, to meet at the office of the said clerk, and, having taken an oath before said clerk faithfully to discharge their duty, open the said packages of ballots, count the same, correct the return if needed, and ascertain and report how many of said ballots were cast by free-holders and how many by non-freeholders for and against subscription, respectively."

It appears from § 64 that this board have also to ascertain the number of qualified voters of the county, the qualifications of the persons voting, and the number of registered voters of the county.

See Redd v. Supervisors of Henry County 31 Gratt., 703-4.

The duties of this board, therefore, are:

1. To count the ballots and correct the return if needed.

2. To ascertain the number of free holders voting for and against subscription, respectively.

3. To ascertain the number of qualified and registered voters of the county and the qualifications of persons voting.

(*a*). The duty of the board to the extent of opening and counting the ballots and correcting the return if needed, is very similar to the duties of canvassing boards in the election of officers. The duties of such boards in the election

of officers are said to be ministerial and the reason given for limiting them to the performance of mere ministerial acts is well stated by the Supreme Court of Missouri in the case of State v. Steers, 44 Mo., 223, which was a case in which the canvassing board had undertaken to throw out the returns from a voting precinct for an alleged informality. The court said: "To permit a mere ministerial officer arbitrarily to reject returns at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard—a thing which the law abhors and prohibits."

McCrary on Elections, (2d ed.) 104, § 81.

In Morgan v. Quackenbush, 22 Barb., 77, it is said, "They (the canvassers) are not at liberty to receive evidence of any thing outside of the returns themselves; their duty consists in a simple matter of arithmetic."

See also Brightley's Leading Cases on Elections 300-306, where numerous authorities to the same effect are cited.

Whether the duty of the board of commissioners in the case at bar, if so limited to counting the ballots and correcting the returns would be called "ministerial" or "judicial" is unimportant. If their duty were merely arithmeticial, yet as a deprivation of property depends upon the result of their calculation, due process of law requires that the tax-payers who are to be affected by the tax should have notice and an opportunity to be heard upon the accuracy of their calculation. If I am to hold or be deprived of my property according as the sum or difference of A's addition or subtraction shall be great or small, due process of law requires that I have an opportunity to examine the accuracy of A's figures, and, if there be error, to make by defense.

Especially is this true in the case at bar for the reason, already stated, that as soon as the bonds go into hands of *bona fide* holders, which may occur immediately, the tax-payer loses his right to resist the tax upon the ground that the report of the board of commissioners is erroneous.

The statute recognizes the reasonable possibility of error in the returns of the precinct judges of election, for it authorizes the return to be corrected if needed. But these commissioners are equally liable to commit honest errors, they are liable also to make false and fraudulent reports as other

canvassing boards have done.

"Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature."

Stuart v. Palmer, 74 N. Y., 184.

Weimer v. Banbury, 30 Mich , 201.

(*b*). The duty of ascertaining the number of free-holders voting for and against subscription is emphatically judicial. It involves questions of fact which can only be properly determined by "inquiries into evidence," "production of witnesses and argumentative consideration" of their testimony. It involves also questions of law as to the legal elements of an estate of free-hold.

It may well be doubted whether a member of this board, as ordinarily composed, can accurately define an estate of free-hold. "It lies at the very foundation of justice, that every person, who is to be affected by an adjudication should have an opportunity of being heard in defense, both in repelling the allegations of fact and upon the matter of law."

Underwood v. McVeigh. 23 Gratt., 418.

In ascertaining the number of free-holders it seems to be necessary that the board should hear evidence upon every ballot. How otherwise can the number be certainly ascertained? The statute only requires the voter to indorse his name upon the ballot. The *return* therefore only shows the *number* of votes cast and the *names* of the voters. All other matters which the commissioners have to "ascertain and report," viz., the number of free-holders, and the number of qualified and registered voters, must be ascertained from evidence *aliunde*.

Supposing that the deeds, by which all the estates of free-hold were held at the time of the election, were of record, still the evidence of these deeds had to be judicially inquired into. But there is no reason, in law or fact, why the recorded deeds and evidences of title should have correctly informed the commissioners as to the character, as freeholder or non-freeholder, of a single voter. A voter may be a free-holder without a *recorded* deed, and the character of a free-holder may be instantly lost by the grantor and acquired by the grantee by the execution and delivery of a deed. The

recorded deeds may therefore be deceptive evidence.

It thus appears that this board have to perform duties of a most difficult and important judicial nature.

As to the manner in which this duty was actually discharged, see record page 31 (complaint filed as Exhibit A with the answer of the Railway Company).

(*c*). Article III of the constitution of Virginia prescribes the qualifications of voters.

The duty of the board to ascertain the number of qualified and registered voters of the county, and the qualifications of persons voting therefore involves the following inquiries:

1. As to sex, citizenship of the United States and age;

2. As to the perplexing question of residence. See report of Mr. Hoar in the case of Cessna v. Meyers, (House of Representatives, 42d Congress). McCrary on Elections, (3d ed.) Appendix, 462;

3. Whether the person has a residence in the county only as an officer, soldier, seaman or marine of the United States stationed therein;

4. Whether he is an idiot or lunatic;

5. Whether he has been convicted of bribery in an election, embezzlement of public funds, treason, felony or petit larceny;

6. Whether he has been convicted of violation of the anti-duelling laws;

7. Whether in cases of convictions his political disabilities have been removed;

8. Whether, in cases of lunacy, he has been restored to sanity;

9. Whether the persons whose names are registered are living or dead.

To say that these are judicial inquiries is to state an elementary proposition.

"To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims."

State v. Steers, Brightley's Lead. Cases on Elections, 304; 44 Mo., 223.

The flagrantly unlawful manner in which this duty was performed is presented at pages 31 *et seq* of the record.

If, on the authorities hitherto cited, canvassing boards in ordinary elections, which deal exclusively with *political* rights, cannot receive evidence of anything outside the returns, without "infringing or destroying the rights of parties without notice or opportunity to be heard," certainly in the case at bar the board of commissioners, affecting as they do by their decision, the citizen's civil right of property, cannot assume jurisdiction to pass upon matters outside the *returns*. Nor can they be constitutionally empowered by the legislature to do so, unless the legislature also positively require that the tax-payers have notice and be heard. This, however, the legislature have not done; but have made the decision of the board final and absolute, and the language of this court, in commenting upon an act of Minnesota, is strikingly appropriate: "It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * * "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare. no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

Chicago &c. R'y Co. v. Minnesota, 134 U. S., 457.

"It is a fundamental principle that before a person can be deprived of a right, even by judicial suit, he must have notice and a reasonable opportunity to be heard in defense of his rights. A tribunal invested by law with power to affect the property of a subject is bound to give such subject an opportunity of being heard before it proceeds. The rule is of universal application, and is founded on the plainest principles of justice. * * * "

"No person can be deprived of his property without a hearing, and this constitutional provision may apply to the assessment of taxes for the support of government. * * * The legislature cannot confer power on a board to proceed

without notice, since this would infringe that provision of the constitution which declares that no man shall be deprived of his property 'without due process of law.' "

1 Desty on Taxation, 597-8 and *seq.*

The settled doctrine of the Court of Appeals of V
that authority to make this subscription cannot
ferred on the supervisors, except by an election, and that "the voters must declare at the polls that the subscription shall be made," which is the necessary construction of the statutory provisions. And the requirement of the statute is that "three-fifths of the qualified voters of the county voting on the question shall be in favor of subscription, and that said three-fifths include a majority of the votes cast by freeholders ut such election and a majority of the registered voters of the county."

Redd et als v. Supervisors of Henry Co., 31 Gratt., 699.
Taylor v. Supervisors of Greensville, 86 Va., 506.

In ascertaining whether *this* vote was cast, the duty of the board of commissioners differs materially from that of ordinary canvassing boards in the elections of officers.

VI.

SECTION 64 OF CHAPTER 61 OF THE CODE OF 1873.

Section 64 of chapter 61 of the Code of 1873 is an assumption by the Legislature of powers and functions strictly and essentially judicial in their nature, and therefore, not "due process of law."

The court will observe that by this section the Legislature makes the report of the board of commissioners *conclusive* upon the county Court of the statements it may contain. The matters involved in the determination whether or not the condition upon which the subscription is authorized has been complied with, necessitate judicial action.

[redacted] It is clear, therefore, that the duty to be performed by the county court is a judicial, not a ministerial act. It is equally clear that by

this section the Legislature has stripped the court of every attribute properly appertaining to the judiciary department, and constituted it a ministerial functionary to carry into execution the judgment rendered by the Legislature itself.

As said by the Supreme Court of Rhode Island in a similar case: "The court acted in the matter, not as a judicial tribunal, but for the General Assembly, just as a committee might have done."

Burke v. Mechanics Sav. Bank, 12 R. I., 513.

It will be observed that section 63 of the Code requires the report to be entered upon the order-book of the court; and section 64 provides: "If it shall appear, by the report of the board of commissioners, that three-fifths of the qualified voters," etc., * * * "the county court shall, at its next session, enter of record an order requiring the supervisors to attend on a day and at a place designated in the order to carry out the wishes of the voters as expressed at the election."

May it here be asked: who *decides* that the report of the board of commissioners sets forth "the wishes of the voters as expressed at the election?" Is it the judgment of the court, or the judgment of the Legislature? The Legislature has plainly stripped the court of all judicial discretion, and has, by its own enactment, *decided* that if the commissioners report in favor of subscription, the report necessarily expresses the wishes of the voters. This report is thus made conclusive evidence of its own statements, and the court is required to render a judgment dictated by the Legislature, not because, in the exercise of an unfettered judicial discretion, it has so determined, but because it appears from the report of the commissioners.

By reference to page 18 of the record, it will appear that the order made by the County Court in this case recites not that the court has decided, but that, "it appearing from the report of said commissioners." This reference of the matter to the court, even if notice and opportunity to be heard were given to the tax-payers, does not relieve section 63 of any of its objectionable features already pointed out.

"In our opinion, this circuity of proceeding, however much it may disguise, does not alter the nature of the transaction. The question, in cases of this kind, is not whether the method

by which the owner of property is deprived of it is direct or circuitous, but whether it is 'due process of law,' 'which means,' it has been said, 'due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.'"

Burke v. M. S. Bank, 12 R. I., 513.

"The constitutional provision that no person shall be deprived of life, liberty or property without due process of law, or, in other words, without a day in court and opportunity for being heard, obviously requires that questions of right be determined by the judicial department of government."

2 Hare's Am. Const. Law., 844.

In speaking of local taxation which "should be based on an assessment not made legislatively, but through some proceeding in accordance with the immutable principle that no man shall be injured in his person or estate, without a hearing," it is said: "Such taxation not only involves an inquiry into facts that cannot be duly ascertained without the production of witnesses and an argumentative consideration of their testimony that would seriously embarrass and delay legislation, but *transcends the legislative province* * * * and is *at variance with the constitutional distribution of the functions of government* among its several branches. This is the more true because the *existence of the power* depends in such cases upon a *preliminary inquiry*. * * * The question was ably considered and placed on what would seem to be the true basis in the case of Stewart v. Palmer, 74 N. Y., 188."

1 Hare's Am. Const. Law., 213-14.

Mr. Webster, in his argument of the Dartmouth College case in this court, urging a similar objection to the New Hampshire statutes, said: "By these acts the legislature assumes to exercise judicial power. It declares a forfeiture * * * without *trial or hearing*. If the constitution be not altogether waste-paper, it has restrained the powers of the legislature in these particulars. If it has any meaning it is that the legislature shall pass no act directly and manifestly impairing private property and private privileges. It shall not *judge* by act. It shall not *decide* by act. It shall not *deprive* by act. But it shall leave all these things to be tried and adjudged by the law of the land."

In the case of Savannah, F. & W. R'y Co. v. Geiger, 21 Fla., 669, the Supreme Court of Florida said, in reference to an act of the legislature of that State, which made the affidavit of the owner *conlusive* of the amount of damages against railway companies for killing stock: "The Legislature can not *create judgments*, even as to the single element of the amount of damages upon the basis of an *ex parte* affidavit."

In the case In Re Splane, 16 Atl. Rep., 481, an act of Pennsylvania, which undertook to make it imperative upon the courts to admit an attorney to practice who filed a certificate of the presiding judge of the county from which he came to the effect that he is of reputable professional standing, etc., was held to be "an assumption of judicial power and unconstitutional," it being "a judicial, not a ministerial act" to admit an attorney.

In Blackwell on Tax Titles (5th ed.), § 847, it is said: "The Legislature cannot *constitutionally* declare a tax deed conclusive evidence of a material fact, upon the existence of which the power to sell and convey depends." * * * A legislative attempt to make the deed *conclusive* evidence * * * is *unconstitutional.*"

See also in In Re Lake, 3 So. Rep., 579.
Strode v. Washer, 16 Pac., 926.
Immegart v. Gorgas, 41 Iowa, 439.
Davis v. Vanarsdale, 59 Miss., 367.
Marx v. Hawthorn, 30 Fed., 579.
Bannon v. Burnes, 39 Fed., 892.

VII.

TAXATION

The court will observe that the immediate result of the order of the county court, is the subscription by the board of supervisors (see record, page 18), the delivery of county bonds to the railway company, and immediate taxaton to pay the bonds and interest thereon. In the recent case of Supervisors of Cumberland County v. Randolph, 17 Va., Law Journal 93-99, § 1248 of the Code of Virginia of 1887 (the same provision is contained in § 66 of chapter 61 of the Code of 1873, given as appendix 4 hereto), is held to require the board of supervisors to levy a tax to pay such bonds, as a ministerial duty about which the supervisors have no discretion. It is also held that holders of these bonds before

maturity are presumed to be *bona fide* holders unless *fraud* or *illegality* in the inception of the bonds be shown, and no other defense can be made. Lewis P. speaking of the preliminary proceedings, such as a popular election, on which the authority to issue the bonds depends, and the action of the officers whose duty it is to ascertain these preliminary requisites, says: "In such case the recital is itself a *decision* of the fact by the appointed tribunal, and *estops* the corporation as against such holder to contest it. * * * Its (the board of supervisors') duty in the matter was clear and purely ministerial, viz: to levy a tax to pay them as § 1248 of the Code requires."

The Court of Appeals thus recognizes that the action of the board of commissioners and officers charged with the ascertainment of the preliminary requisites, is *judicial*, otherwise it could not be said that the "recital is itself a decision by the appointed tribunal."

The contention for the plaintiffs in error is that before this "appointed tribunal" can constitutionally render this "decision" subjecting them, as tax-payers of the county, to the taxation, they must have notice and a hearing.

The decision is in effect a judgment against them; the tax bill is an execution.

It was contended by counsel for the railway company that the tax-payers are not deprived of their property within the meaning of the constitution by the proceedings complained of, because the taking is not immediate.

To this the words of Mr. Justice Field are a complete answer: "whether it takes property directly, or creates a *charge* or *liability* which may be the *basis of taking it*, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of 'due process of law.'"

Railroad Tax Case, 13 Fed., 723.

VIII.

ACT OF JANUARY 15, 1875.

It is true that, by the act approved January 15, 1875, (Session Acts 1874–'5, p. 29), it is provided that "the returns of said election, or decision of the voters, shall be subject to the inquiry, determination, and judgment of the court

of the county * * * upon the written complaint of fifteen or more of the qualified voters of the county of an undue election or false returns," which must be filed within thirty days after the election. But this act does not cure the defects, for the following reasons:

1. Because this act was not passed at the time of and as a part of these sections of the Code. It was passed long after. The character and validity of these sections of the Code were fixed at the time of their enactment. And if, for the reasons stated, they were void, they are mere nullities, *ab initio*. The passage of this act did not give them life. Their status as nullities remained unchanged.

2. Because it provides *no notice*. There must be some kind of notice by some mode of publication. No notice is in any way given by the statute. The act only prescribes the length of time after the election within which the complaint be made. And the election, being a special one, may be held "at any time" named by the county court. So that the law affords no notice of the action of the board of commissioners, and no notice of the pendency of the report in the county court.

"Notice is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause."

Cooley Const. Lim., (6 ed.) 496, *n.* 2.

"I am of opinion that the Constitution sanctions no law imposing such assessment without a notice to and a hearing, by the owners of the property to be assessed. It is not enough that the owners may by *chance* have notice. The law must require notice, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what *may by its authority* be done."

Earl, J., in Stuart v. Palmer, *supra*.

"If such a right (the right to notice) and opportunity to be heard is an essential element of 'due process of law,' the law must provide for it *as a right*. The party is not required

to accept it as a boon by the favor or good nature of the officers."

Sawyer, J., in Santa Clara County v. So. Pacific R'y Co., 18 Fed. 429.

See also Boggs v. The Commonwealth, 76 Va., 1000, in which Judge Staples said: "If the petitioners had notice, it was *accidental*, and not through any legal notification *provided by the statute*. * * * This very point arose in Hibbard v. The People, 4 Mich., 125. The court, in commenting upon it, used the following language: 'It is said that the proceedings under the liquor law may be so conducted consistently with its provisions as to secure to the person whose property is seized all his constitutional rights. If this is possible, that is not enough. The law must afford to the accused the means of demanding and enforcing his constitutional rights, and, if it authorizes a course of procedure which would deprive him of this, it is void.' "

3. Because the privilege of being heard, even upon the legality of the *election* and *returns*, is expressly limited to *fifteen or more qualified voters*, instead of being given to *all* of the *tax-payers* of the county. However fraudulent may be the election, and however false may be the returns, the act only opens the doors of the court to qualified voters, and to them only, upon condition that "fifteen or more" join in the complaint. The right to be heard, under any circumstances whatever, is, by the provisions of this act, absolutely denied to all other property-owners of the county, together with fourteen qualified voters, just as, by the provisions of the Code, it is denied to *all* the property-owners and tax-payers, whether qualified voters or not. By the laws of this State women, whether married or *sole*, may acquire and hold taxable property of all kinds. So also may men who, for the various causes of disability and disfranchisement, are not qualified voters. So also may children and persons under any disability whatever. And all these persons, either in their own persons or by their guardians, committees, or proper representatives, are entitled to all the privileges of litigation for the protection of their property which may be exercised by qualified voters. The government, by the exercise of the right of eminent domain, cannot touch the property of persons, even under disabilities to sue in their own

rights, without affording to them a hearing in the proper form and by the proper persons. See Mills on Eminent Domain (2d ed.) § 72, *et seq.*, a principle fully recognized in our Code. (See Code of 1887, § 1075.) And the clause of the fourteenth amendment of the United States Constitution forbidding the States to deprive *any person* of life, liberty, or property without "due process of law," or to "deny to *any person* within their jurisdiction the equal protection of the laws," is not a guaranty to *qualified voters* alone, *if fifteen or more* join in a complaint. To hold otherwise would be to make the constitution say to the States: "You shall not deprive *any person* of life, liberty, or property without due process of law, unless he is not a qualified voter, and even qualified voters shall not be protected, unless fifteen or more complain."

The Legislature cannot make a dichotomy of the property owners into voters and non-voters, and deny to the non-voters the right to defend their rights of property. The constitutional guaranty protects every *person*, native or alien, good or bad, old or young, rich or poor, singly or collectively, male or female natural or artificial.

Santa Clara County v. So. Pacif. R'y Co., 18 Fed., 385.

Same v. Same, 118 U. S., 394.

L. & N. R. R. v. Tenn. R. R. Com'n, 19 Fed., 679.

Yick Wo v. Hopkins, 118 U. S., 356.

Re Newport Charter, 14 R. I., 655.

Strander v. West Virginia, 100 U. S., 303; Id., 315; Id., 339.

Neal v. Delaware, 103 U. S., 370.

Pearson v. Portland, 69 Me., 278.

The right to *vote* is a *political* right *in* the government which the States can confer upon such persons as they may determine within certain limits; but the right to *sue* for the protection of the rights of life, liberty, and property is a *civil* right *under* the government, which cannot be given to some and withheld from others. By virtue of being *qualified voters* the qualified voters determine the propriety of authorizing the subscription, but by virtue of being *property owners*, all of the property-owners of the county are entitled to be heard on the question whether or not the qualified

voters have authorized the subscription. A vote in favor of subscription entails upon the property-owners of the county the burden of paying the public debt thereby incurred, which debt is to be collected in the summary manner provided for the collection of taxes, without notice and without hearing. On the question, therefore, whether the requisite vote was cast in favor of subscription, *each tax-payer*, regardless of his qualification as voter, is entitled to be heard. In consequence of this vote, the property of the tax-payers will be taken and transferred to the holders of the county bonds; but before there can be such taking, there must be an opportunity to be heard given to all the tax-payers. The tax to be levied is not a tax which the Legislature has *absolutely* empowered the county to levy. It is a tax which will be levied to discharge a debt growing out of a private contract between the county and the railroad company, which contract the Legislature has *conditionally* empowered the county to enter into. To ascertain whether the *condition* precedent has been performed, judicial action is necessary, and every tax-payer is entitled to notice and an opportunity to be heard before the board or tribunal which performs this judicial function.

4. Because the act only purports to make the *returns* of the election or decision of the voters subject to the inquiry, judgment, and determination of the court of the county; it does not make the *report of the board of commissioners* subject to such inquiry, determination, and judgment. "If it shall appear by the report of the board of commissioners, * * * the county court *shall*," etc. This is the legislative mandate to the court. According to the statute over this report, neither the tax-payer nor the court can exercise the slightest control. It is insisted that the statute, in order to provide due process of law, and to avoid being a legislative assumption of judicial power, ought to provide that after the report has been entered upon the order-book of the court, an order shall be entered directing the tax-payers to show cause, if any they can, against the confirmation of the report; and if no sufficient cause be shown, that the order to the supervisors be entered, leaving to the court full discretion in passing upon the sufficiency of the cause, and requiring the order directing the cause to be shown to be

sufficiently promulgated by some mode of publication to apprise the tax payers of their opportunity to be heard. The Legislature cannot, without invading the province of the court, assume that the report of the board of commissioners "expresses the wishes of the voters." This is a matter for the court to determine, *ex mero motu*, if necessary, or upon a full hearing of the railroad company and the tax-payers. Suppose the court should perceive, or have good reason to believe, that the report of the commissioners was false or fraudulent, and all the non-voting tax-payers and fourteen qualified voters should object to the adoption of the report, still, according to the statute, the court would be powerless, and would be compelled to sanction a fraud, because the statute only gives the court jurisdiction to inquire into the *election* and the *returns*, and into these only, upon "complaint of fifteen or more qualified voters." It is believed that no other single instance can be cited in which a court is required to adopt and confirm a report of its commissioners without extending to parties interested the right to except and be heard and without the power to exercise any judicial discretion in reference to its adoption and confirmation.

This report of the board of commissioners is not the *election* and not the *return*. Yet the complaint must allege an *undue election* or *false return*, otherwise this act does not authorize it to be made. It may be that the *election* is proper and the *return* is true, yet the report of the commissioners may be erroneous, through mistake or fraud. Section 63 contemplates a variance between the report and the return, for it authorizes the commissioners to "correct the return if needed." Who can assume the correctness of the commissioners' corrections? But besides "counting the ballots and correcting the return" the commissioners have to ascertain and *report* whether "three-fifths of the qualified voters of the county voting at said election are in favor of subscription" and whether "said three-fifths include a majority of votes cast by free-holders and a majority of the registered voters of the county." In the discharge of this duty there is ample room for honest errors and also for frauds. As to how the commissioners discharge this duty there is no possibility under the statutes for either the court or the tax-payers, whether voters or not, to inquire or to

ascertain. And the obvious reasons upon which the County Court *quashed* the complaint, as appears from the record (see p. 37), is that the manner in which the commissioners discharged this duty was set up in the complaint, and the court held that it had no jurisdiction of such an inquiry.

IX.

DENIAL OF EQUAL PROTECTION OF THE LAWS.

5. Because this act, if it be regarded as standing alone in its imperfection, or the whole system of laws for the subscription by municipal corporations to the stock of internal improvement companies, if it be regarded as an inseparable portion of that system, is repugnant to the first clause of the fourteenth amendment of the United States Constitution, which forbids the States to "deny to any person within their jurisdiction the equal protection of the laws," and, therefore, void.

The laws of Virginia, the court will observe, only authorize "fifteen or more qualified voters" to make any resistance to a proceeding to saddle the property-owners of a county with gigantic debts of this kind. All the other property-owners are denied a hearing in the courts. They must submit to any amount of fraud and outrage, because the Legislature has shut the doors of the courts to their complaints. The ablest and most comprehensive authority on the clause of the Constitution relied on here to which I can refer the court is the case of Santa Clara County v. The So. Pac. R'y Co., 18 Fed., 385. In this case opinions are delivered by Mr. Justice Field, presiding on the circuit, and by Judge Sawyer. On page 397 Mr. Justice Field, after stating the language of the amendment and declaring its extensive operation beyond the mere protection of the enfranchised race, says: "Oppression of the person and spoliation of the property by any State were thus forbidden, and equality before the law secured to all. In the argument of the San Mateo Case, in the Supreme Court, Mr. Edmunds, who was a member of the Senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: 'There was no word in it that did not undergo the completest scrutiny. There was no word in it that was not scanned and intended to mean the full and beneficent thing that it seems to mean. There was no discussion

omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered. And the purpose of this long and anxious consideration was that protection against wrong and oppression should be made forever secure. To use his language: 'Secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending on their local tribunals for its efficient exercise, but secure, as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States, and the whole body of the people.'

"With the adoption of the amendment the power of the States to oppress under any form was forever ended; and henceforth *all persons* within their jurisdiction could claim equal protection of the laws. And by equal protection is meant *equal security* to *every one* in his *private rights*—in his right to life, to liberty, *to property*, and to the pursuit of happiness. It implies not only that the *means which the law affords for such security* shall be *equally accessible* to all, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to any religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—shall touch the life, liberty, or property of *any person*, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws. * * * The amendment is aimed against the perpetration of injustice and the exercise of arbitrary power to that end. The position that *unequal taxation* is not within the scope of the prohibitory clause would give to it a singular meaning. * * * It

would, indeed, as counsel in the San Mateo Case ironically observed, be a charming spectacle to present to the civilized world if the amendment were to read, as contended it does, in law: 'Nor shall any State deprive any person of his property without due process of law, except it be in form of *taxation*, nor deny to any person within its jurisdiction the equal protection of the laws, except it be by taxation. No such limitation can thus be engrafted on the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws." On page 429 of the same case Judge Sawyer said: "In the forcible and accurate language of Mr. Edmunds, which I cannot improve: 'The fourteenth amendment was a new Magna Charta that was, in fact, in form and effect a fundamental security to every person in the State in respect to *every private right* that could be invaded, and an absolute affirmation of equality of *civil* rights to all persons before the law. The first clause forbids the State to touch life, liberty, or property without due process of law; and the second forbids that, even with due process of law, any person shall be denied the equal protection of the laws. This is the plain letter of the amendment. It is its intrinsic and beneficent spirit, and it was its purpose.

* * * What, then, is equality of protection? A *civil* right *under* a government is a distinct thing from a *political* right *in* it Thus, a State may deny to females the right to vote, but it cannot deny to them the *right to sue in courts.*

* * * To hold otherwise would lead to the affirmation of the right of the State to make race, or color, or religion, or *age*, or stature the criterion of *civil* rights, and to exert the absolute right of confiiscation by classes or descriptions [which I contend is done by the act in question denying to property-owners who are not qualified voters the right to sue]. for in such a case every person of that class or description would stand on an equality with his fellow-victims.'

"It is not denied that a State may classify the persons who are to perform certain public duties, or bear certain public burdens, based upon personal peculiarities of either sex or calling, etc., as to require military service only from males, or to exempt females from a poll-tax, and impose a license

tax upon certain trades, or tax all franchises of corporations and their special privileges; but it could not impose a poll tax on one-half its male and female citizens that it did not impose on the rest in like degree. And when we come to the case of property as property, to be affected by a tax, or any other imposition imposed upon it as a thing of value, a distinction cannot be made to depend upon *character* or *occupation* or *quality*, or *any individual characteristics* of the citizen. To hold otherwise would be to set up the very essence of tyranny and atbitrary power.

"Equal protection is the same protection under the same circumstances; all are to stand alike in like intrinsic conditions. Holding property as property is certainly a like intrinsic condition. In the administration of justice, if the criteron of a right to sue be value, all must have the same right when the same value is concerned: or if the criterion be the nature of the controversy, all must have the same right *whose causes are of the same nature*. This appears to be too clear for discussion.

"So, too, in the matter of taxation. If the tax, as in this case, be laid upon the value of property, all persons must stand on the same footing * * * without reference to what particular characteristics as citizens or persons they may have as *sex*, or race, or *age* or *quality*, or calling. The basis of the imposition being property as such, the fact that certain property is owned by a corporation, or a white man, or a man of bad character, or a clergyman, cannot be made the ground of a levy that both in form, in fact, and in result is unequal and injurious. Any other doctrine necessarily implies that the State may carry such unequal exactions to the end of complete confiscation by edict of all the property of any class or man, who, during the passion of the hour, may not be in the sunshine of popularity." (See also notes of editor, pages 449–'50–'51–'52 and '53.)

See also Cooley Cons. Lim., (3d ed.), 391–'92.
Lewis v. Webb, 3 Greenl., 326.
Durham v. Lewiston, 4 Greenl., 140.
Holden v. James, 11 Mass., 396.
Picquet, Appellant, &c., 5 Pick., 65.
Budd v. State, 3 Humph., 483.
Wally's Heirs v. Kennedy, 2 Yerg., 554.

Officer v. Young, 5 Yerg., 220.
Arnold v. Kelley, 5 W. Va., 446.

The taxation resulting from this election being a mode of deprivation of property, I submit that the criterion of the right to contest the election is the ownership of property, and that the act is void by reason of the discrimination against the non-voting property-owners.

In the case of Yick Wo v. Hopkins, 118 U. S., 367, this court said that the fourteenth amendment undoubtedly intended "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons be equally entitled to pursue their happiness and acquire and enjoy property; that they should have *like access to the courts of the country* for the protection of their persons and property, the prevention and redress of wrongs. * * * Class legislation, discriminating against some and favoring others, is prohibited."

There can be no question of the right of the appellants to insist upon this objection, as well as any other that may be raised by any tax-payer, since this suit is for the benefit of all the tax-payers, and all the tax-payers of the county will be estopped by the decision in it.

2 Black on Judg., sec. 584.

X.

DISMISSAL OF THE COMPLAINT FILED UNDER THE ACT OF JANUARY 15th 1875.

The foregoing *a priori* conclusions as to the character and effect of the act of January 15th 1875, are fully vindicated by the facts disclosed by the record.

By reference to pages 27–38 of the record the court will observe that the voters of the county did file their complaint, charging that the subscription was not voted for, which complaint is verified by the oaths of two complainants.

This complaint fully reveals the character of the proceedings of the board of commissioners.

It charges:

That the Railway Company by its agents and attorneys illegally purged the registration books of the names of registered voters of the county and in consequence many voters of the county were denied their right to vote;

That the board of commissioners having proceeded far enough with the count to find that it was doubtful whether a sufficient number of votes were in favor of subscription to constitute a majority of the registered voters, the Railway Company procured the registrars to mark "removed" or "dead" or "said to be removed or dead" or "believed to be removed or dead" as to other names, so that the names so marked might not be counted as registered voters, and thus change the result of the election;

That the names so illegally stricken from the registration books, *after the election*, were sufficient to have defeated the subscription;

That the report of the board of commissioners entered upon the order book of the county court is a false report;

That the commissioners proceeded to count the ballots returned to the clerk's office and to ascertain what ballots were cast for and against subscription in utter disregard of law;

That the commissioners, without authority of law, rejected eighty-eight ballots against subscription;

That the report is false as to the numbers of free-holders voting for and against subscription, and is also false as to the number of registered voters of the county, for the conclusive reasons stated in the complaint;

That the alleged vote in favor of subscription is the result of this arbitrary proceeding of the board of commissioners; and,

That the commissioners, by a vote of three to two, refused to embody in their report any statement of their unlawful methods of procedure, and, by the same vote, adopted those methods.

The court will observe that the conduct of the commissioners constitutes the chief cause of complaint, and that it was in consequence of their illegal action that the vote was declared to be in favor of subscription.

Yet because the action of the commissioners was set up in the complaint, and was, in fact, the *chief matter* to be subjected to judicial investigation, the county court *quashed* the complaint and dismissed for want of jurisdiction.

It will also be observed that the county court in this matter exercised a *limited* jurisdiction—only such as the act of

January 15th 1875 conferred, viz: to pass upon the "*return* of the election," not the *report* of the commissioners. The report embraces matters which constitute no part of the *return*. This is the necessary construction of the statute. It is the construction placed upon it by the county court, a court of *final* jurisdiction (see record p. 38), and, therefore, the highest *State* court which can pass upon it. This construction will, therefore, be followed by this court. It had to be submitted to by the citizens of the county. Certainly the tax-payers are entitled to notice of the proceedings of the board of commisioners and to a hearing before their liability becomes fixed by such proceedings.

XI.

CIVIL AND POLITICAL RIGHTS.

If it be incumbent on the plaintiffs in error to suggest a reason which induced the Legislature to enact laws as arbitrary as those hitherto discussed, the following reason is submitted:

By reference to § 9 of chapter 10 of the Code of Virginia of 1873, it will be found that there is a provision for the contest of *elections of officers* by "fifteen or more qualified voters."

The Act of January 15th 1875 appears to be a copy almost *in totidem verbis* of this section of the Code. And it is obvious that the Legislature has attempted to assimilate the *civil* right of property to the *political* rights involved in contests of elections of officers, and overlooked the distinction between the civil right of every person to hold property secure from deprivation except by due process of law, and the political interest which the people have in the determination of what persons may or may not be elected to offices.

Political rights are 'those which may be exercised in the formation or administration of the government."

Black's Law Dict., 909.

Elections of officers, therefore, are purely *political* matters of which courts have no *inherent* jurisdiction. The Legislature in the exercise of the political powers of government may make *no* provision for contesting elections of officers, or may provide for contests in the courts upon such arbitrary terms as it may prescribe.

Civil rights are "rights capable of being enforced or re-

dressed in a civil action."

Black's Law Dict. 208.

It is the *special* province of the courts to maintain and protect civil rights. They alone are guarded by the *lex terrae* of Magna Charta and the "due process of law" of American constitutions.

The legislature, therefore, under the *form* of an *election*, cannot invade the individual's right of property, without conforming to the requirements of "due process of law."

I would not be understood as asserting that it is improper to submit the question of subscription to voters only. This is proper. My contention is that if the ascertainment of the result of the election involves judicial inquiries each *taxpayer*, as such, is entitled to participate in the inquiry and to make defense to the taxation consequent upon the result of the election.

It is well settled that courts of equity have no inherent jurisdiction in contests of political elections.

But in elections for the purpose of *taxation*, "*any taxpayer* of a municipal corporation may bring a bill in equity."

1 Wood's Ry. Laws, 332 § 131 and cases cited.

The distinction which I have endeavored to make here is recognized by the Supreme court of Tennessee in the case of Winston v. Tenn. and Pacific R. R. Co. 1 Jere Baxter, 60, 67. In the syllabus it is said: "Where a county court submits the question of subscription of stock to a railroad company to a vote of the people, the question whether it was submitted in pursuance of law, or, in other words, whether the county court, under the circumstances, had authority to submit it, is a question *not in the nature of a contested election between candidates for office.*" "When the question of the obligation of a contract of subscription is to be settled because of want of authority on the part of the county to make it, *for want of proper assent on the part of the people of the county*, the question of the result of what is, *by accommodation in the use of terms*, called an *election*, must be investigated, not under the idea of contesting an election, but for the purpose of ascertaining whether the contract of subscription made has been authorized according to law, and so binding on the county. In this view of the question it will be seen that it is not a question of contesting an election brought into a

court of Chancery, but the question of the validity and obligation of a contract which by the law is made to depend on the assent of the majority of votes given at the ballot box as a condition to its being made, and that the result and validity of the election are to be ascertained, in order to determine the question whether a binding contract has been made as to the corporation or county."

See also Chestnutwood v. Hood, 88 Ill., 132–136.

The position I insist upon, from the principle underlying the foregoing decisions, is that as "the result and validity of the election are to be ascertained in order to determine the question whether a binding contract has been made," a judicial inquiry is necessary, and that all persons who are to be affected by the tax are equally entitled to be heard in their defense according to those principles which constitute due process of law, and not according to the arbitrary political provisions which constitute the ordinary "election machinery," and the statutes must provide for such hearing before the tax becomes effectual.

XII.

SECTION 10 OF THE CHARTER.

The court will observe that I have thus far discussed the constitutionality of this subscription with reference to "the character of the tax" which it will impose. The court will also remember that "due process of law" may require notice and an opportunity to be heard to be given to the tax-payers, either by reason of the "character of the tax" or "the manner in which its amount is determinable."

Hagar v. Reclamation District, 111 U. S., 701.

Let us now consider the constitutionality of section 10 of the charter of the railway company with reference to "the manner in which the amount of the tax is determinable."

The effect of section 10 is to authorize a delivery of bonds of the county to the railway company in payment of the subscripeion, and to provide a mode of ascertaining the amount of bonds to be issued and delivered, and consequently to ascertain the amount of the tax to be imposed in consequence of the subscription.

By section 9 of the charter the county is empowered to subscribe $3,500 per mile for each mile constructed within its limits. What is the number of miles constructed and on

which the track has been substantially laid is the vital question. To ascertain this involves an inquiry in which the tax-payers "have a right to take part and be heard." This right of the tax-payers, however, the act entirely disregards. There can be no pretence that any notice is given to any tax-payer, voter or non voter, male or female, old or young, rich or poor, or any hearing, or opportunity to be heard, on this most important question. Bonds of the county are required to be issued for every mile which, "by said report, appears to be graded," etc. The effect of this section is to place the property-owners of the county at the absolute mercy of the arbitrary will, power, discretion, ignorance, fraud, and mendacity of this commissioner without giving them any possible opportunity to question the truthfulness of his report, either as to the number of miles of railroad in the county or the manner of its construction. Under this section neither the court nor the board of supervisors can question the report. It is made conclusive evidence of its own statements. Whether this commissioner report the proper construction of one or a thousand miles within the county, it is all the same. The board of supervisors shall issue and deliver to the railway company bonds of the county "for every mile of railroad which, by said report, appears to have been graded and the track substantially laid thereon." This is the absolute requirement of the statute.

"In such proceedings it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge becomes finally established against him. We should say that notice of the proceeding in such cases and an opportunaity for a hearing were matters of constitutional right."

Cooley on Taxation, 265-'6.

XIII.

BONDS OF COUNTY IF STATUTES ARE VOID.

If the foregoing statutes are unconstitutional the subscription and bonds are void, whether the bonds are in hands of the railway company or other persons.

Cole v. LaGrange, 113 U. S., 1.

Northern Bank v. Porter Township, 110 U. S. 608.

Dixon v. Field, 111 U. S. 83.

School Dietrict v. Stone, 106 U. S., 183.

Parkersburg v. Brown, 106 U. S., 487.
Hayes v. Holly Springs, 114 U. S. 120.
Cooley's Const. Lim. (6 ed.) 271 notes.
1 Wood's R'y Laws § 101.
Ryan v. Lynch, 68 Ill., 160.
Kelly v. Milan, 127 U. S., 139.
Norton v. Dyersburg, 127 U. S., 160.
Lake County v. Graham, 130 U. S., 662.
Wells v. Pontiac County, 102 U. S., 625.
Marsh v. Supervisors of Fulton County, 10 Wall, 677.
Ottoway v. Carey, 108 U. S., 110.
Daviers County v. Dickinson, 117 U. S., 657.
Bissell v. Kanakee, 64 Ill., 249.
People v. Hamill, 17 N. E. Rep., 799.
Williams v. Roberts, 88 Ill., 11.

XIV.

REPLY TO DEFENDANTS' MOTION TO DISMISS OR AFFIRM.

Since the foregoing argument of the case upon its merits was prepared, I have received from counsel for the defendants' notice of their motion to dismiss or affirm, and a copy of their brief in support of their motion.

I shall reply briefly to the positions taken by them.

1. The first point in support of the motion is that the bill does not allege *in terms* that the statutes are repugnant to the constitution of the United States.

To this, a sufficient reply seems to be: That the allegation in terms that the statutes are repugnant to the constitution is an allegation of a mere conclusion of law, which it is unnecessary for the bill to state. The bill alleges all the essential facts, and this is the whole object of a bill in chancery. The proper office of pleadings, whether at law or in equity, is to give the court official knowledge of facts which the court could not otherwise officially know. It is therefore unnecessary surplusage to state in pleadings matter of law or any other matter of which courts take official notice.

The allegations of a bill in equity 'must be of facts only, and not of law."

Mitford's & Tyler's Pleading and Practice in Equity, 64.

"The stating part of the bill sets out the essential facts upon which the complainant relies."

4 Minor's Institutes 1122.

"It is not necessary to state matter of which the court takes notice ex officio, therefore it is unnecessary to state matter of law, for this the judges are bound to know, and can apply for themselves to the facts alleged."

Stephen on Pleading, (Tyler) 312.

The statutes brought in question in this case are public statutes of the State of Virginia.

"Courts of justice take official notice of public statutes and the general jurisprudence of the State under which they act. * * * A state court will take notice of the Federal constitution and amendments to it."

Sutherland on Statutory Construction, 244, § 181.

This court also, in the exercise of its appellate jurisdiction, takes official notice of State statutes.

Id. 249 § 185.

The bill in this case, with its exhibits, alleges the application to the county court by the railway company in accordance with the act of incorporation; the order of the county court directing an election to be held "in accordance with the provisions of sections 62 and 63, chapter 61, Code of Virginia 1873;" the appointment by the judge, in vacation, of the board of commissioners and the report of the commissioners in accordance with section 63; the order of the court in accordance with section 64; the subscription by the supervisors in accordance with section 65; the execution and delivery of bonds of the county in accordance with section 10 of the charter; and the consequential taxation under section 66 of chapter 61 of the Code of 1873. (see record, pages 6, 7, 16, 17, 18, and 19).

Having pleaded these facts the plaintiffs may insist upon any matter of law arising from them. "*Ex facto jus oritur*; that is, every question of law necessarily arises out of some given state of facts; and therefore nothing more is necessary than for each party to state, alternately, his case in *point of fact*."

Stephen on Pleading (Tyler) 314.

The court will observe that the Railway Company demurred to the bill. The demurrer raised the issue of law at once. And the questions presented to the circuit court were (1) whether the statutes of Virginia were sufficient to

authorize the subscription, and, (2) whether the subscription was in accordance with the requirements of the statutes. These two questions are necessarily involved, and to have rendered the decree holding the subscription valid, the circuit court necessarily decided both in the affirmative.

The statement in the defendants' brief that these federal rights were not raised in the circuit court is unwarranted. For the reasons stated, they are *necessarily involved* in the pleadings, and must have been passed upon by the court in reaching its judgment. The arguments in the circuit courts are, by the practice prevailing in Virginia, always *oral*, and of course do not appear when cases are taken to the appellate courts. In considering a case therefore in the appellate court the decision of the inferior courts must be taken to cover all questions of *law* and *fact* involved in the pleadings or otherwise properly presented by the record.

In the case at bar the record shows that proceedings have been had against the property of the tax-payers in exact conformity with public statutes, which obviously deprive them of their property "without due process of law," and the circuit court could not have rendered its decision without deciding that these statutes are not repugnant to the constitution.

In the case of Wilson et als. v. Blackbird Creek &c. Co., 2 Pet. 245–250, a plea was filed alleging *facts only* from which Federal questions arose, and Chief Justice Marshall said: "Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States;" but on the ground that the Federal question arose from the facts pleaded this court held that its jurisdiction attached.

2. The statement in the brief of the defendants that the Federal questions were not properly presented to the court of Appeals, is also untenable, because:

(a) For the reasons already stated, they were necessarily involved in the pleadings and were necessarily decided by the circuit court.

(b) Being *substantial rights* on the merits of the case disclosed by the record, they were properly before the court of Appeals for decision.

The court of Appeals unquestionably has appellate juris-

diction only, except in cases of *habeas corpus*, mandamus and prohibition. But the well settled rule of appellate jurisdiction and procedure in Virginia is that: "Objections in respect to matters of *fact* and of *proceeding*, which might have been obviated if they had been made in the court below cannot first be presented in an appellate court." But "where the record itself discloses material error on the merits, it is ground for reversal, although no objection be made on that account in the court below."

4 Minor's Institutes, 871–875.

In accordance with the latter principle the court of Appeals has taken cognizance of material error on the merits in numerous cases.

Cookus v. Peyton, 1 Gratt., 431.
Wells v. Dunn, 5 Gratt.. 384.
Mathews and Garner's Case, 18 Gratt., 989.
Taylor v. Spindle, 2 Gratt., 44.
Richardson v. Davis, 21 Gratt., 706.
Bird v. Bird, 21 Gratt., 712.
Armentrout v. Gibbons, 25 Gratt., 371.
Dabney v. Preston, 25 Gratt., 831.
Redd v. Supervisors, 31 Gratt., 699.

In the case of Jones v. Commonwealth 87 Va., 63, it is expressly decided that a question as to due process of law may be raised at any stage of the proceeding.

In that case it is said: "The omission to direct a *venire facias* when required, is an error apparent on the record, of which advantage may be taken * * * for the first time on a writ of error in the appellate court" (page 65) the *venire facias* being "a part of the 'due process of law' which the legislature has provided" (page 66).

See also Bank of U. S., v. Smith, 11 Wheat., 171.
Scott v. Sandford, 19 How., 393.
Woodward v. Brown, 13 Pet., 5.
Rogers v. Burlington, 3 Wall., 654.

"And in short, whatever material error appears in the record by bill of exceptions or otherwise * * * is ground for reversal." 4 Minor's Inst., 875, citing

Boulware v. Newton, 18 Gratt., 720.
Suydam v. Williamson, 20 How., 428.

Rule No. 2 of the court of Appeals provides: "A clear and

concise printed brief of the points intended to be insisted on by each party in an appeal, writ of error or supersedeas, and the authorities in support thereof, signed by his counsel, on the part of the appellant, shall be filed in the clerk's office ten days before the argument of the case begins; * * * and no error other than such as shall be pointed out and insisted on in such brief, on the part of the plaintiff or appellant, shall (without leave of the court) be admitted as a ground for argument on the hearing."

In conformity with this rule the brief for the plaintiffs, insisting on the Federal questions, was filed November 12th 1891, several months before the argument, which occurred in February 1892 (see record, pages 43–50). At the hearing also, by leave of the court, additional arguments were submitted.

It therefore appears, without reference to the certificate of the President of the court of Appeals, that the plaintiffs have complied with all the requirements of the rules of pleading and practice in Virginia in the presentation of their rights, titles, privileges and immunities under the constitution of the United States.

It is a significant fact that the objection, now made, that these questions were not properly before the court of Appeals, was not made in that court, and the opinion of the court contains no intimation that these questions were not properly before it. It is true the opininon does not deal with them at length; but they are included in the decision: "On *all* other questions we are of opinion to affirm the decree."

The certificate of the Hon. L. L. Lewis, the presiding judge, is positive "that the Federal questions" (relied on in this court) "were duly raised by the assignments of errors made and argued by the petitioners in the Supreme court of Appeals, * * * and that the decision of the Federal questions was necessary to the determination of the said suit and were actually decided by the said Supreme court of Appeals of Virginia." (See record page 53).

This case therefore comes fully within the reasoning of this court in the case of Armstrong v. Treasurer of Athens Co., 16 Pet., 281–6, where it is said: "We presume that the certificate of the presiding judge was made by the authority of the court; and as this bill and answer show that such a

point might have arisen, and this certificate shows that it did arise, and was decided * * * this court must take jurisdiction, and examine whether the point so certified was rightfully decided."

The cases cited by the defendants in their brief, where this court has held that its jurisdiction did not attach, are not analogous to the case at bar. In Caldwell v. Texas, 137 U. S., 692, the Federal question was presented to the State court by petition for rehearing, which is to late. The other cases are criminal proceedings or actions at law, in which the Federal right arose, if at all, out of a state of facts which were not properly gotten into the record in the trial courts, and which, therefore, could not be considered on appeal.

The decisions of this court in cases most nearly analogous to the case at bar are in the cases of Armstrong v. Athens Co., 16 Pet., 281-6, *supra*, and Kaukauna Co. v. Green Bay &c. Canal Co., 142 U. S., 254-269. In these cases the proproceedings were by bill in equity alleging the essential facts only, and the Federal question arising out of a public law applicable to those facts. In the latter case the court say: "This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State court."

In the case of Chicago Life Ins. Co. v. Needles, 113 U. S., 574-579, the court said: "The Supreme court of Illinois did not in terms pass upon the claim distinctly set up there. * * * But the final judgment necessarily involved an adjudication of that claim; for if the statutes, upon the authority of which alone the Auditor of the State proceeded, are repugnant to the national constitution the judgment could not properly have been rendered."

"When the court may reasonably infer from the record, in a case brought here by writ of error from a State court, that the Federal question raised here was necessarily involved in the decision, the court will not dismiss the writ on motion to dismiss for want of jurisdiction, although it may not appear affirmatively on the record that the question was raised there."

Eureka Lake &c. Co. v. Superior Court &c., 116

U. S., 410.
Roby v. Colehour, 146 U. S., 153-161-2.
Gross v. U. S. Mortgage Co., 108 U. S. 477.

3. The argument of counsel for the defendants that sections 62, 63 and 64 of chapter 61 of the Code of 1873, are not applicable to this subscription, is now obsolete.

In the case at bar by reference to Exhibit "1" filed with the bill the court will observe that the order of the county court directing the election contains the recital that the court proceeded and that the election was ordered in accordance with the charter of the railway company and "in accordance with sections 62 and 63 of chapter 61 Code of Virginia 1873." The election and all the other proceedings are in literal compliance with these sections and sections 64 and 65, (see record pages 16–19) and the court of Appeals, in its opinion filed in this case, declares that these proceedings have been had "by virtue of its (the railway company's) charter and the general laws of the State upon the subject." (See record page 30.)

The argument at best was based upon a thoughtless expression of the court of Appeals in the case of Taylor &c., v. Supervisors 86 Va., 506–510, which crept into the decision as *obiter dictum* and which has been corrected by the decision in the case at bar.

The court in the case of Taylor v Supervisors only *decided* that section 62, in so far as it required the order of the county court to state in numbers the maximum amount to be voted upon and prescribed the limit to the maximum sum was superseded by section 9 of the charter of the railway company, which, as to subscriptions to the stock of this particular company, required the order to state only that the vote was to be taken upon the question of subscription of $3,500 per mile, without an ascertainment of the number of miles and without regard to whether or not the sum of $3,500 per mile would exceed the limit prescribed by sec. 62.

To hold that sections 62, 63 and 64 do not apply would render the remaining laws destitute of legal or grammatical significance. Sections 65 and 66 are inseparably connected with, and dependent upon, the three preceeding sections. And even the language of the court of Appeals in the conclusion of the opinion in Taylor v. Supervisors, which is quoted

by the defendants, does not sustain their contention because it recognizes the necessity for "the voters to declare at the po'ls that the subscription shall be made." thereby holding that sections 62, 63 and 64 must apply, for it is only by authority of these sections that the election can be held—that the voters can declare at the polls.

This argument was made by the defendants in the Court of Appeals, and the plaintiffs, in their brief filed in reply, called the court's special attention to the inaccuracy in its language in the case of Taylor v. Supervisors, as follows:

"It seems a trivial answer to say that this court has decided that 'the forms' of the Code of 1873, are those contained in §§ 65-6 of chapter 61.

"It is obvious that what was said by this court in reference to these sections in the case of Taylor v. The Supervisors, 86 Va., 506, was merely *obiter dictum*, and we feel confident that it is only necessary to call the court's attention to language inadvertently used by the court while its attention was directed to the points to be decided.

"We respectfully submit that the court, in that case only *decided* that the order of the county court of Greensville county was sufficient, being in conformity with § 9 of the charter of the Atlantic & Danville Railway Company, and that § 62 of chapter 61 of the Code was superseded in this particular case by § 9 of the charter in so far as § 62 provided the general form of orders for elections under the provisions of the Code. This court of course did not intend, as contended by appellees, that § 62 in so far as it provides for ordering an election, and sections 63 and 64 in as far as they provide for the manner of holding the election and ascertaining the result, do not constitute a part of 'the forms provided by the Code of 1873,' according to which section 9 of the charter requires this subscription to be made."

Having had its attention thus specially called to this inaccurate and contradictory sentence the court of Appeals in its opinion in this case, corrected the error by declaring that these proceedings are "by virtue of the general laws of the State," which, it is respectfully submitted, sets the question at rest.

The cases of Redd v. Henry County, 31 Gratt., Taylor v. Supervisors, 86 Va., 506, and this case have all recognized

these sections as applicable, and it is respectfully submitted, that the question is settled beyond controversy against the contention for the defendants.

The president of the court of Appeals would not have certified that Federal questions arising from these sections were involved in the decision of that court, if, in the opinion of the court, the sections themselves were not involved.

4. In reply to the contention by defendants that the election proceedings are unnecessary, it is submitted:

(a) While the legislature may authorize municipal corporations to issue bonds to aid in the construction of railroads, it cannot compel them to do so. The expediency of making the issue must be left to the discretion of the voters or the fiscal officers of the county.

People v. Batchellor, 53 N. Y., 128.

Cairo &c. R. R. Co. v. Sparta, 77 Ill., 505.

And in addition to the reasons given in those cases, a compulsory tax by the legislature upon a county for the purpose of constructing a railroad—a work of internal improvement not limited to the county—would be contrary to the uniformity of taxation required by the constitution.

City of Norfolk v. Chamberlain, 17 Va., Law Journal, 53.

In recognition of these principles, § 9 of the charter of the railway company provides: "The following counties *may* subscribe," etc. There is no provision in the charter or the general laws authorizing the subscription except upon the condition that it be voted for by the people.

(b) The statement, in the brief of the defendants, that the legislature might have authorized the subscription without the sanction of a vote of the people, therefore, requires no further comment.

In point of fact under the statutes which alone exist in this case the majority vote in favor of the subscription prescribed by the statutes is the indispensable requisite of the power of the supervisors to make the subscription. The county court and supervisors, by section 64, have power only "to carry out the wishes of the voters as expressed at the election." And therefore a constitutional ascertainment of the result of the election is *necessary* to the validity of the tax.

This court in the case of Hagar v. Reclamation District *supra*, has fully sustained this contention of the plaintiffs, holding that while the legislature may, without a hearing, impose a specific tax, the imposition of which involves no inquiry, yet if it impose a tax depending upon any facts to be ascertained by judicial inquiry, notice and hearing must be provided for, and it is no answer to say that the legislature might have acted otherwise.

5. The assertion by implication on page 9 of brief of defendants that the general tax laws of the State give the tax-payer a hearing is unwarranted. There is no hearing provided for in the general tax laws, and in the nature of things there can be none for if the tax-payer waits to resist the tax, the bonds will have been issued, and some *bona fide* holder will be put forward to plead estoppel as to all defenses he might make upon matters of *fact*. But independently of this the tax-payer is entitled to notice and hearing "before the proceeding becomes effectual." Counsel have not cited, and cannot cite, any provision of the "general tax laws" by which, after the bonds are issued and the tax is imposed, any tax-payer can be relieved from the tax upon the ground that the subscription was not authorized by the proper vote, or the road was not constructed according to the requirements of the statute or the contract of subscription.

The plaintiffs object to the tax upon the ground that the *proceeding* by which they are made *liable* for it is unconstitutional.

San Mateo Co. v. So. Pacific R. R. Co. 13 Fed. Rep., 722.

Stuart v. Palmer, 74 N. Y., 184.

6. The fact that defendants do not mention the reference made in the opinion of the court of Appeals to an alleged matter of compromise, renders it unnecessary to say more than that the statement of the court is based upon matters wholly *de hors*, introduced by counsel for the railway company, and which, forming no part of the case, were not understood by the court.

The decree of the circuit court is emphatically an *adjudication*. This extraneous matter cannot impeach the record *collaterally*. The court having *decided* the case on appeal fixes the character of the decree as appealable.

The compromise agreement mentioned in the opinion was a paper embodied in the brief of the defendants, purporting to be an agreement between the company and the supervisors, to which the plaintiffs were not parties. This agreement, if it was in fact made, was studiously kept out of the record of this case by counsel far the railway company who drew the decree of the circuit court, for no other purpose than to avoid the effect of the decision of this court in the case of Kelly v. Milan, 127 U. S., 139, and was filed in the court of Appeals only for the purpose of prejudicing the case of the plaintiffs.

Counsel in filing it admitted that it could have no *legal* effect upon the cause, and it should have none.

E. P. BUFORD,
FOR PLAINTIFFS IN ERROR.

NOTE.—The publication by the defendants of the statutes involved renders it unnecessary to print them here. Section 10 of the charter of the railway company is at page 54, and the Act of January 15th 1875 is at page 56 of the record.

FILED.
OCT 25 1893
JAMES H. McKENNEY,
CLERK

150-433

RECORD CASE NO. 15,268.

Supreme Court of the United States,

OCTOBER TERM 1893.

TERM NO. 898.

R. S. POWELL & ALS.
vs.
THE SUPERVISORS
OF BRUNSWICK COUNTY, &c.

BRIEF OF APPELLEES ON
MOTION TO
DISMISS OR AFFIRM.

Kirkham & Co., Printers, Petersburg, Va.

R. A. POWELL & ALS. vs. THE SUPERVISORS OF BRUNSWICK COUNTY, &c.

Bill to Inject
Motion to
Demurrer to Answer

The facts of the case bearing upon the points raised
sufficiently appear in the

gross frauds and irregularities in [illegible]
making the returns, induced by the [illegible]
pany, and participated in by the officers of [illegible]
company had never been duly organised, and was [illegible]
of making a contract of subscription to its stock;—That the act incorporating the company was void because in conflict with the clause in the State Constitution which provides "No law shall embrace more than one object, which shall be expressed in its title"; and also because it violated the clauses of the constitution inhibiting the State from lending its credit, subscribing to, or becoming interested in the stock of any company, or work of internal improvement. But it nowhere claimed or set up any right, title, privilege, or immunity under the Constitution of the United States.

The defendant answered denying all of the allegations of the bill and depositions were taken by the plaintiffs attempting to prove the facts alleged by them.

The case being duly matured came on to be finally heard in the circuit court when a decree was entered dismissing the bill. An Appeal was taken to the Supreme Court of Appeals of the state, and upon full hearing the decree of the lower court was affirmed. From this decree the plaintiffs take their appeal to this court, upon the asserted claim that a Federal question is involved, and has been decided against them by the Supreme Court of the state.

The question whether the evidence was sufficient to justify the decree of the lower court, is not a Federal question; and the rulings of the Supreme Court of the state on the objection to the validity of the statue in question, so far as they are founded on its asserted conflict with the State Constitution is not an open question here according to the repeated decisions of this court.

Baldwin vs. Kansas, 129 U. S., 52, 57. Kennard vs. Louisiana ex. rel. Morgan, 92 U. S., 480. Town South Ottawa vs. Perkins, 94 U. S., 260, 266. Missouri Pacific R. R. vs. Haines, 115 U. S., 512. Leeper vs. Texas, 139 U. S., 462. Spencer vs. Marchant, 128 U. S., 345, 352. Provident Institution vs. Jersey City, 113 U. S., 506, 514. Post vs. Supervisors, 105 U. S., 667. Norton vs. Shelby County, 118 U. S., 425.

The only matter printed in the record which seems even to raise a Federal question is that contained in the [illegible] assignment of error on page 44 of the printed record in these [illegible] "(7). Section 9 of the charter of the Atlantic and [illegible]

[illegible] And by the [illegible] [illegible] [illegible]

said company, or an amount the interest upon which, at the rate authorized by the * * * Board of Supervisors of any county * * * shall not require the imposition of an annual tax in excess of twenty cents on the one hundred dollars.

(63). "The commissioners of election who, if there be none otherwise legally appointed, shall be designated in the order authorizing the vote, after taking an oath faithfully to discharge the duty assigned to them, shall open polls at the various places of voting in the said county, * * * designated in the order, and at the time therein designated, and shall conduct such election, and close the polls in such manner as is provided by law in other elections; and at said election each qualified voter who shall approve such subscription shall deposit a ticket or ballot, on which shall be written or printed the words, "For subscription," and each voter who shall oppose said subscription, shall deposit a ticket or ballot, whereon shall be written or printed, "Against subscription." And each ballot shall be endorsed with the name of the voter, which shall be inspected by the officer or officers conducting the elections at the respective voting places. The commissioners of election at the several places of voting, shall, immediately after the closing of the polls at each said place, count the ballots deposited, and shall, within two days after the said election, make return to the judge of the county court, * * * of the number of votes cast for and the number of votes cast against subscription, and shall return to and deposit with the clerk of the said court, * * * in separate sealed packages, the ballots for and against subscription. And the said judge * * * shall appoint four citizens of the county, * * * who, with the clerk aforesaid, shall constitute a board of commissioners, whose duty it shall be, within two days thereafter, to meet at the office of the said clerk, and, having taken an oath before said clerk faithfully to discharge their duty, open the said packages of ballots, count the same, correct the same if needed, and ascertain and report how many of the said ballots were cast by freeholders and how many by non-freeholders for and against subscription respectively, which said report, signed by a majority of said board, shall be entered on the order book or other proper record book of the said court.

(64). If it shall appear, by the report of the board of commissioners, that three-fifths of the qualified voters of the county, * * * voting upon the question, are in favor of subscription, and that said three-fifths includes a majority of

order requiring the supervisors of the county, * * * to attend on a day and at a place named in the order, to canvass the wishes of the voters, as expressed at said election."

If subscription be voted for, how it is to be made and how payments secured by loans; levy therefor.

(65). If a majority of the whole number of supervisors * * * be not present at the time and place so designated, they shall adjourn from time to time until a majority shall be present, when they shall determine what amount of the capital stock, not exceeding the maximum aforesaid, shall be subscribed for on account of the county, * * * and shall order and record the amount so agreed upon, and thereupon shall appoint an agent or agents to make the subscription; which subscription shall be paid in such installments as may be agreed upon by said board, * * * or as may be called for by the company.

(66). For the purpose of paying the quotas on said stock, or the said instalments, as they may be called for, as fast as the board of supervisors * * * shall have power to appoint an agent or agents to negotiate a loan or loans, and to issue bonds to secure the payment of the same, for and in the name of said county, * * * which may be either registered or coupon, as may be prescribed; and when the levy is made * * * in said county, * * * a tax shall be levied on all property liable to State tax in such county, * * * to pay the amount of such subscription or of such loans, and interest thereon, or to pay the interest on the bonds as issued, and to create a sinking fund to redeem the principal thereof, as the authority ordering the levy or tax may deem necessary or proper; and from year to year said levy or assessment shall be made until the debt and interest are paid. But such levy or assessment for a year shall not exceed one-tenth of the whole amount of such subscription, with the interest thereon."

This claim was first set up in the Supreme Court of the State, in the supplemental brief filed by the appellants. There is nothing in the record of the case in the Circuit Court [illegible]

which it can be even inferred that the appellants [illegible] right, title, privilege, or immunity under the [illegible] the United States; the Circuit Court was not called upon to pass upon any such question, and the Court of Appeals was only authorized to review the decree for errors committed by the Circuit Court.

The State Constitution provides that: "The Supreme Court of Appeals shall consist of five judges, any three of whom may hold a court. It shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus* and *prohibition*." Constitution Va., Art. VI, sect. 2.

In point of fact the Supreme Court of the State did not consider this objection, and no reference whatever is made to it in the written opinion delivered by the court and printed on pages 38-43 of this record.

It is submitted that, under the circumstances, this court will not consider the objection, according to the rule laid down in Spies vs. Illinois, where it says: "As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

Spies vs. Illinois, 123 U. S., 131, 181. Caperton vs. Bowyer, 14 Wallace, 216, 234. Kennard vs. Louisiana ex. rel. Morgan, 92 U. S., 480. Balwin vs. Kansas, 129 U. S., 52, 57. Clark vs. Pennsylvania, 128 U. S., 395, 397. Manning vs. French, 133 U. S., 186, 191.

But further, in order to give this court jurisdiction under the section 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause.

Citizens Bank vs. Board of Liquidation, 98 U. S., 140. Williams vs. Oliver, 12 Howard, 125. Klinger vs. State of Missouri, 13 Wall., 257.

Now in this case the whole contention of the appellants is based upon the unwarranted assertion that sections 62, 63, 64, of the Code of 1873 were, by reference, incorporated into and became a part of sect. 9 of the charter of the railroad company under which the subscription was made, and that these sections are in conflict with the 14th Amendment of the Constitution of the United States.

[illegible] in the [illegible] court [illegible]
[illegible] last time in the supplemental brief [illegible]
of the State;—and the question was [illegible]
court in its written opinion delivered in [illegible] will be fully justified in refusing to retain this case [illegible] argument, and may avail itself of the "rule ordinarily applicable to the afterthought of counsel," as it did in the case of Caldwell vs. Texas, 137 U. S., 692, 698-9.

But if it be admitted, for the sake of the argument, that the sections referred to were incorporated into, and made a part of the charter of the railroad under which the subscription was made, we cannot conceive how these provisions would make the law obnoxious to the provision of the constitution of the United States which is invoked by the appellants.

These provisions do not take any property, nor impose any tax; they simply provide a convenient method by which to ascertain whether the voters of the county desire a subscription to be made on behalf of the county by its properly constituted authorities. It is true that, in cases arising under this statute, the subscription cannot be legally made until the assent of the qualified voters has been taken upon the question, in the manner therein prescribed. But the subscription is not made in virtue of any power conferred by the vote. The power by which the subscription is made is universally held to be the sovereign power of taxation which resides in the legislature; which may be granted to the county authorities by the legislature, to be by them exercised either with or without a vote of the people; but the power is not aided by the vote of the people.

Railroad company vs. county of Otoe, 16 Wall. 667. Geddin vs. Crump, 8 Leigh, 120. Harrison Justices vs. Holland, 3 Gratt. 236. Bull and als. vs. Read 13 Gratt. 78. Langhorn and Scott vs. Robinson, 20 Gratt. 661.

The only way in which the property of the tax-payer can be affected under this statute is by the payment, or levy, of the tax imposed under the provisions of sec. 66, to pay off the subscription made under the provisions of sec. 65, neither of which sections are assailed. And this tax is required to be laid upon all the property liable to taxation in the county, and is to be collected under the general tax laws of the state. [illegible] such circumstances it certainly cannot be held [illegible] the tax-payer shall be given notice of every [illegible]

should be exercised upon his land; there is no taking of property without due process of law."

Pearson vs. Portland, 160 U. S. 41. Davidson vs. New Orleans, 96 U. S., 97. McMillan vs. Anderson, 95 U. S., 37. Kentucky R. R. tax cases, 115 U. S., 321. Home Ins. Co. vs. New York, 134 U. S., 593. Caldwell vs. Texas, 137 U. S. Bell Gap R. R. vs. Pennsylvania, 134 U. S. 232. Leeper vs. Texas, 139 U. S., 462.

There is no pretense here that the general tax laws of the state do not give ample opportunity to every tax payer to be heard upon this question, and we submit that the objections made to the sections referred to do not raise any question giving jurisdiction to this court; or if they do give jurisdiction, that the question upon which jurisdiction depends is so frivolous as not to need further argument.

We therefore, respectfully, submit that this appeal should be dismissed for want of jurisdiction. Or if the court shall be of opinion that it has jurisdiction of the case, that the decree of the state court should be affirmed.

RICHARD WALKER,
RICH'D B. DAVIS.

IN THE

Supreme Court of Appeals of Virginia

BELL, &c., FOR, &c., *v.* F. & P. R. R. Co., &c.

Brief of E. P. Buford, of Counsel for Appellants.

In support of the assignment of error made by my learned associate, the undersigned respectfully submits, that the laws of the State of Virginia under which the supposed subscription in this case was claimed to have been made, and purporting to authorize the same, are repugnant to the fourteenth amendment of the Constitution of the United States, and the final decree of the Circuit Court of Petersburg (printed p. 85-6-7) is erroneous for the following reasons:

1. Section 62 of chapter 61 of the Code of Virginia of 1873, and the special act 1876–'7, p. 65–6–7, deprive the tax-payers of their property without due process of law, because they provide for an election which is the basis of deprivation of property, but require no notice of the election to be given to the voters.

2. Section 63 of said Code and said special act deprive the tax-payers of their property without "due process of law," because they provide for the appointment of a board of commis-

sioners to ascertain judicially the result of said election, but give no notice to the tax-payers and give them no hearing or opportunity to be heard.

3. Section 64 of said Code and said special act deprive the tax-payers of their property "without due process of law," because they provide for a proceeding upon the report of the board of commissioners in the County Court, but give no notice to the tax-payers and give them no hearing or opportunity to be heard.

4. Section 64 of said Code and said special act, by making the report of the board of commissioners *conclusive*, are a legislative assumption of judicial power and is not "due process of law."

5. The act of January 15, 1875, (Acts 1874–'5, p. 29) and said special act deprive the tax-payers of their property "without due process of law," because they provide no adequate mode of contesting the validity of the election and the truth of the report of the board of commissioners.

6. The said act of January 15, 1875, by giving the right to contest the "election" and "returns" to *fifteen or more qualified voters* collectively, only denies to the *tax-payers* who are *not* qualified voters, and to each single tax-payer, whether a qualified voter or not, the "equal protection of the laws."

What is "Due Process of Law" When Applied to Taxation?

It has been argued that the government's necessity for revenue overshadows, and, to some extent, excludes the individual's right to "due process of law" when his property is taken under the form of taxation.

To this there are two replies:

1. It is not true. The constitutional provision for "due process of law" applies to taxation as well as to every mode of deprivation of property. The State can no more dispense

with the essential elements of "due process of law" in the imposition of taxes than in suits between individuals or in prosecutions for crimes. The necessity for revenue justifies an application of the constitutional requirement adapted to the particular nature of the taking of property involved in the legitimate imposition and enforcement of taxation. But under whatever form the individual is deprived of his property—whether as a punishment for crime or in private suits, or by the right of eminent domain, or by taxation, or otherwise—there must be "such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley's Const. Lim. (6th ed.) 434.

Black's Law Dictionary, 399.

2. The plaintiffs in error were denied their constitutional rights in the proceedings before the subscription was attempted to be made and bonds were issued, and consequently, before any necessity for taxation existed.

"Law of the land means due process of law according to the common, rather than to the provisions of the statute, law."

"And since every *enactment* is not necessarily the 'law of the land,' particularly when it may chance to be a special statute addressed to the rights of an individual or a locality, the phrase 'due process of law' has a general meaning, covering with impartial equality the *civil* rights of all the citizens.'"

Ordronaux's Const. Legislation, 631–255.

"Everything which may pass under the *form of enactment* is not, therefore, to be considered the law of the land. . . . The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction ab-

solutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

Cooley's Const. Lim. (6th ed.) 431–2.

In this case, therefore, it is not sufficient to say that the proceedings have been in compliance with the statutes. *The statutes themselves must contain the essential elements of due process of law.*

Statutes which undertake to impose a tax or assessment *must*, if there is or ought to be any judicial or *quasi* judicial inquiry as to the *right to impose the tax* or as to the *amount of the tax to be imposed*, give to the tax-payers, who are to be affected by the tax, *notice of the proceeding and a hearing or opportunity to be heard, at some proper stage of the proceeding before the tax becomes effectual.*

This is believed to be the consensus of all the authorities. It is the settled doctrine of the U. S. Supreme Court.

Chicago, &c., Railway Co. v. *Minnesota*, 134 U. S., 457.

In the case of *Murdock* v. *Cincinnati*, 39 Fed., 891, it is held: "A special assessment, without notice to the property owner, and an opportunity to be heard, is wanting in 'due process of law,' though neither the city nor the State laws require such notice, and its enforcement will be enjoined."

See also *Scott* v. *City of Toledo*, 36 Fed., 385.

In *Boorman et als.* v. *City of Santa Barbara*, 65 Cal., 313, it is held that "an act authorizing street improvements which does not provide for notice of the proceedings to the parties to be assessed for the expense is unconstitutional and void."

In the case of *Butler* v. *Supervisors of Saginaw County*, 26 Mich., 22, which involved questions under an act of Michigan

authorizing drainage, and empowering the board of supervisors to apportion the expense among the townships, in their discretion, benefited, Judge Cooley said: "The power to tax is indeed plenary; but taxation implies public interest; and, in cases like these now in question, it also implies proceedings *in pais*, in some of which the tax-payers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative."

In *Patton* v. *Green*, 13 Cal., 325, Baldwin, J., says: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax the land as they may choose, without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of such power."

In re Trustees of N. Y. Prot. Epis. Pub. School, 31 N. Y., 574, Judge Denio says: "It is manifestly proper that the tax-payers should have notice of the imposition proposed to be levied upon them, and an opportunity for making suggestions and explanations to the proper administrative board or office."

In *Ireland* v. *Rochester*, 51 Barb., 414, Judge Smith, speaking of the imposition of assessments, says: "It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. It is a plain principle of justice, applicable to all judicial proceedings, that no person should be condemned unheard, or shall suffer judgment against him, without an opportunity to be heard." And he says that an act assessing persons without notice transcends the power of the Legislature, and is itself void.

"It is a fundamental rule that in all judicial or *quasi* judicial proceedings, *whereby the citizen may be deprived of his property*, he shall have notice and an opportunity to be heard before the proceeding can become effectual."

In re Ford, 6 Lans., 92.

"The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding against his property, and that in some form he may be heard, if wrong is apprehended, before any portion of his property is seized for the support of government."

Overing v. *Foote*, 65 N. Y., 265.

Judge Cooley, in his Work on Taxation, at pages 265–6, says: "In such proceedings it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him. We should say that notice of the proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law.'"

"Unless he has these, his constitutional right to 'due process of law' has been invaded."

In re McPherson, 10 N. E. Rep., 688.

"The right of the property-owner to have notice and to be heard before his property can be taken, or before a burden can be imposed upon it, must be provided for at some proper stage of the proceedings; and an enactment which attempts to justify a tax or assessment without making such provision, is universally regarded as an infringement of the Constitution."

Whiteford Township v. *Probate Judge*, 53 Mich., 130.

"Notice, or, at least, the means of knowledge, is an essential element of every just proceeding which affects the rights of persons or property.

Philadelphia v. *Miller*, 49 Penn. St., 440.

"The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against the person without a hearing. It is a rule, founded on the first principles of natural justice,

older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defence of his rights; and the constitutional provision that no person shall be deprived of these without 'due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation on arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of life, liberty, or property. This the Legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

"This guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"No case, it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments. . . . It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment rendered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property; and in the same sense, as the judgment debtor is deprived of his by the judgment."

Stuart v. *Palmer*, 74 N. Y., 184.

In the *Railroad Tax Case*, 13 Fed., 723, Mr. Justice Field, speaking of "due process of law" as applying to taxation, said: "And by 'due process of law' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. . . . It must give to the parties to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process of law. If it touched life and liberty, it would be wanton punishment, or, rather, wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is in the same clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceedings against either without the observance of all the securities applicable to the case recognized by the general law—by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceedings in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so also where title or possession of property is in contention. . . . And whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of 'due process of law.' Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

In the case of *Underwood* v. *McVeigh*, 23 Gratt., 418, Judge Christian says: "The authorities on this point are overwhelm-

ing, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way."

See also the opinion of Judge Staples in *Boggs* v. *The Commonwealth*, 76 Va., 989.

The cases of *Davidson* v. *New Orleans*, 96 U. S. 97, and *Hagar* v. *Reclamation District*, 111 U. S., 701, have been cited as opposing the position of the appellants. Certainly there is nothing in these cases opposing us, and they are strongly relied upon by the appellants as sustaining their position.

In both cases the acts brought in question are sustained for the simple and obvious reason that they expressly provided that the tax imposed could only be enforced by a suit in court, after due notice to the tax-payer, in which he could assert every possible defense to the imposition.

In the latter case Mr. Justice Field declares the general principle that the tax-payers are entiled to have notice and be heard whenever, in the imposition of the tax or the ascertainment of its amount, there is an "inquiry into the weight of evidence or other element of a judicial nature," and also that the right to notice and hearing "may depend upon the character of the tax" and the manner in which its amount is determinable."

See also 1 Desty. on Taxation, 597–8.

Let us now consider the several Virginia statutes *seriatim*, and, first, with reference to "the character of the tax" which they impose.

In ordinary instances of taxation for governmental purposes, the government acquires no right to compel the citizen to pay illegal taxes by pleading the doctrine of *estoppel* against the citizen's right to assert his defense. Yet if taxes are imposed, for the most necessary purpose of government, in violation of the constitutional right of the citizen to have notice and a hearing "at some proper stage of the proceeding," and "before the proceeding becomes effectual," the tax is void.

The "proper stage" at which the tax-payers should have had notice of the proceeding to impose this tax upon them and an opportunity to resist, was at sometime before the subscription was attempted to be made and the bonds were issued.

The statutes, however, provide no such notice and opportunity before or after.

This failure of the statutes is one of the grounds upon which their validity is questioned in this court.

SECTION 63 OF CHAPTER 61 OF THE CODE OF 1873.

Section 62 of chapter 61 of the Code of 1873, empowers the county court to "make an order requiring the sheriff and commissioners of election, at the next general election, . . . or at any other time, not less than thirty days from the date of said order, which shall be designated therein, to open a poll and take the sense of the qualified voters on the question whether the board of supervisors shall subscribe to the stock of any internal improvement company."

No notice of the election is required by this section. Neither does the order of court require notice (see record pages 15–16, "Exhibit A" filed with bill.)

"An election held without notice to the voters is void; but the notice may be given by the law itself. Where the time and place are fixed by the law itself, all the voters must take notice of it. When the time and place are to be fixed by some authority, the failure to give notice will render the election a nullity."

6 Am. and Eng. Encyc. of Law, 297–8.

The election provided for by section 62 is a special election, the time of holding which is not fixed by law. Notice, therefore, is essential to its validity.

Whatever is necessary to constitute a valid election must be prescribed by the legislature. "An election cannot take place without statutory regulation. All the efficacy given to the act

of casting a ballot is derived from the law-making power, and through legislative enactment, and the legislature must provide for and regulate the conduct of an election, or there can be none."

McCrary on Elections, 129, § 121.

McCune v. *Weller*, 11 Cal., 49.

The statute must require notice to be given to the voters, by positive provision, not leave them to obtain notice by chance or the caprice of officers.

Stuart v. *Palmer*, 74 N. Y., 183.

Boggs v. *Commonwealth*, 76 Va., 989.

Santa Clara County v. *So. Pacific R'y Co.*, 18 Fed., 429.

Hibbard v. *People*, 4 Mich., 125.

The result of the election might have been different if proper notice had been given to the voters.

"The right to levy a local tax may be made to depend upon the vote of the district, and the exercise of this right is under the control of the legislature. The power to levy may be conditioned that it be authorized by a vote of the legal electors of the district to be charged with the amount to be raised by the assessment. Notice of the meeting to vote the tax must be given, and this is material to the validity of the election."

2 Desty on Taxation, 1121, § 170.

See also page 1126.

SECTION 63 OF CHAPTER 61 OF THE CODE OF 1873.

The manifest object of this section is to provide a mode of ascertaining *judicially* the result of the election—whether or not the vote required to authorize the subscription was cast.

The objection made to this section as well as to said special act is that it provides for this judicial inquiry, but gives no notice to the tax-payers, and gives them no hearing or opportunity to be heard.

This section, after providing for the holding of the election and making the returns, requires the Judge of the county to "appoint four citizens of the county, who, with the clerk, shall constitute a board of commissioners, whose duty it shall be, within two days thereafter, to meet at the office of the said clerk, and having taken an oath before said clerk faithfully to discharge their duty, open the said packages of ballots, count the same, correct the return if needed, and ascertain and report how many of said ballots were cast by freeholders and how many by non-freeholders for and against subscription, respectively."

It appears from § 64 that this board have also to ascertain the number of qualified voters of the county, the qualifications of the persons voting, and the number of registered voters of the county.

See Redd v. *Supervisors of Henry County*, 31 Gratt., 703–4.

The duties of this board, therefore, are:

1. To count the ballots and correct the return if needed.

2. To ascertain the number of free-holders voting for and against subscription, respectively.

3. To ascertain the number of qualified and registered voters of the county and the qualifications of persons voting.

(*a*). The duty of the board to the extent of opening and counting the ballots and correcting the return if needed, is very similar to the duties of canvassing boards in the election of officers. The duties of such boards in the election of officers are said to be ministerial and the reason given for limiting them to the performance of mere ministerial acts is well stated by the Supreme Court of Missouri in the case of *State* v. *Steers*, 44 Mo., 223, which was a case in which the canvassing board had undertaken to throw out the returns from a voting precinct for an alleged informality. The court said: "to pemit a mere ministerial officer arbitrarily to reject returns at his mere carpice or pleasure, is to infringe or destroy the rights of par-

ties without notice or opportunity to be heard—a thing which the law abhors and prohibits."

McCrary on Elections, (2d ed.) 104, § 81.

In *Morgan* v. *Quackenbush*, 22 Barb., 77, it is said, "They (the canvassers) are not at liberty to receive evidence of any thing outside of the returns themselves; their duty consists in a simple matter of arithmetic."

See also Brightley's Leading cases on election 300–306 where numerous authorities to the same effect are cited.

Whether the duty of the board of commissioners in the case at bar, if so limited to counting the ballots and correcting the returns, would be called "ministerial" or "judicial" is unimportant. If their duty was merely arithmetical, yet as a deprivation of property depends upon the result of their calculation, due process of law requires that the tax-payers who are to be affected by the tax should have notice and an opportunity to be heard upon the accuracy of their calculation. If I am to hold or be deprived of my property according as the sum or difference of A's addition or subtraction shall be great or small, due process of law requires that I have an opportunity to examine the accuracy of A's figures, and, if there be error to make my defense.

The statute recognizes the reasonable possibility of error in the returns of the precinct judges of election, for it authorizes the return to be corrected if needed. But these commissioners are equally liable to commit honest errors; they are liable also to make false and fraudulent reports as other canvassing boards have done.

"Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature."

Stuart v. *Palmer*, 74 N. Y., 184.

Weimer v. *Banbury*, 30 Mich., 201.

(*b*). The duty of ascertaining the number of free-holders voting for and against subscription is emphatically judicial. It involves questions of fact which can only be properly determined by "inquiries into evidence," "production of witnesses and argumentative consideration" of their testimony. It involves also questions of law as to the legal elements of an estate of freehold.

It may well be doubted whether a member of this board, as ordinarily composed, can accurately define an estate of freehold. "It lies at the very foundation of justice, that every person, who is to be affected by an adjudication should have an opportunity of being heard in defense, both in repelling the allegations of fact and upon the matter of law."

Underwood v. *McVeigh*. 23 Gratt., 418.

In ascertaining the number of freeholders it seems to be necessary that the board should hear evidence upon every ballot. How otherwise can the number be certainly ascertained? The statute only requires the voter to endorse his name upon the ballot. The *return* therefore only shows the *number* of votes cast and the *names* of the voters. All other matters which the commissioners have to "ascertain and report," viz., the number of freeholders, and the number of qualified and registered voters, must be ascertained from evidence *aliunde*.

Supposing that the deeds, by which all the estates of freeholder were held at the time of the election, were of record, still the evidence of these deeds had to be judicially inquired into. But there is no reason, in law or fact, why the recorded deeds and evidences of title should have correctly informed the commissioners as to the character, as freeholder or non-freeholder of a single voter. A voter may be a freeholder without a *recorded* deed, and the character of a free-holder may be instantly lost by the grantor and acquired by the grantee by the execution and delivery of a deed. The recorded deeds may therefore be deceptive evidence.

It thus appears that this board have to perform duties of a most difficult and important judicial nature.

(c). Articles III. of the constitution of Virginia prescribes the qualifications of voters.

The duty of the board to ascertain the number of qualified and registered voters of the county, and the qualifications of persons voting therefore involves the following inquiries:

1. As to sex, citizenship of the United States and age;

2. As to the perplexing questions of residence. See report of Mr. Hoar in the case of *Cessna* v. *Meyers*, (House of Representatives, 42d Congress.) McCrary on Elections, (3d ed.) Appendix, 462

3. Whether the person has a residence in the county only as an officer, soldier, seaman or marine of the United States stationed therein;

4. Whether he is an idiot or lunatic;

5. Whether he has been convicted of bribery in an election, embezzlement of public funds, treason, felony or petit larceny;

6. Whether he has been convicted of violation of the anti-duelling-laws;

7. Whether in cases of convictions his political disabilities have been removed;

8. Whether, in cases of lunacy, he has been restored to sanity;

9. Whether the persons whose names are registered are living or dead.

To say that these are judicial inquiries is to state an elementary proposition.

"To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims."

State v. *Steers*, Brightley's Lead. Cases on Elections, 304; 44 Mo., 223.

If, on the authorities hitherto cited, canvassing boards in ordinary elections, which deal exclusively with *political* rights, cannot receive evidence of anything outside the returns, without "infringing or destroying the rights of parties without notice or opportunity to be heard," certainly in the case at bar the board of commissioners, affecting as they do by their decision, the citizen's civil right of property, cannot assume jurisdiction to pass upon matters outside the *returns*. Nor can they be constitutionally empowered by the legislature to do so, unless the legislature also positively require that the tax-payers have notice and be heard. This, however, the legislature have not done; but have made the decision of the board final and absolute, and the language of the Supreme Court of the United States, in commenting upon an act of Minnesota, is strikingly appropriate: "It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

Chicago, &c. R'y Co. v. *Minnesota*, 134 U. S., 457.

"It is a fundamental principle that before a person can be deprived of a right, even by judicial suit, he must have notice and a reasonable opportunity to be heard in defense of his rights. A tribunal invested by law with power to affect the property of a subject is bound to give such subject an oppor-

tunity of being heard before it proceeds. The rule is of universal application, and is founded on the plainest principles of justice. . . ."

"No person can be deprived of his property without a hearing, and this constitutional provision may apply to the assessment of taxes for the support of government. . . . The legislature cannot confer power on a board to proceed without notice, since this would infringe that provision of the constitution which declares that no man shall be deprived of his property 'without due process of law.'"

1 Desty on Taxation, 597–8, and *seq.*

The settled doctrine of the Court of Appeals of Virginia is that authority to make this subscription cannot be conferred on supervisors, except by an election, and that "the voters must declare at the polls that the subscription shall be made," which is the necessary construction of the statutory provisions. And the requirement of the Code is that "three-fifths of the qualified voters of the county voting on the question shall be in favor of subscription, and that said three-fifths include a majority of the votes cast by freeholders at such election and a majority of the registered votes of the county."

Redd et als. v. *Supervisors of Henry Co.*, 31 Gratt., 699.

Taylor v. *Supervisors of Greenesville*, 86 Va., 506.

In ascertaining whether *this* vote was cast, the duty of the board of commissioners differs materially from that of ordinary canvassing boards in the elections of officers.

SECTION 64 OF CHAPTER 61 OF THE CODE OF 1873.

Section 64 of chapter 61 of the Code of 1873 is an assumption by the Legislature of powers and functions strictly and essentially judicial in their nature, and, therefore, not "due process of law."

The court will observe that by this section the Legislature makes the report of the board of commissioners *conclusive*

upon the county court of the statements it may contain. The matters involved in the determination whether or not the condition upon which the subscription is authorized has been complied with, necessitates judicial action.

In *Redd* v. *Supervisors*, 31 Gratt., at pages 703–4, Judge Burks says: "The report is the basis for the court's action, and from which it is to determine whether three-fifths of the qualified voters of the county voting are in favor of subscription, and whether said three-fifths include a majority of the registered voters of the county and a majority of the votes cast by freeholders at the election." It is clear, therefore, that the duty to be performed by the county court is a judicial, not a ministerial act. It is equally clear that by this section the Legislature has stripped the court of every attribute properly appertaining to the judiciary department, and constituted it a ministerial functionary to carry into execution the judgment rendered by the Legislature itself.

As said by the Supreme Court of Rhode Island in a similar case: "The court acted in the matter, not as a judicial tribunal, but for the General Assembly, just as a committee might have done.

Burke v. *Mechanics Sav. Bank*, 12 R. I., 513.

It will be observed that section 63 of the Code requires the report to be entered upon the order-book of the court; and section 64 provides: "If it shall appear, by the report of the board of commissioners, that three-fifths of the qualified voters," etc., . . . "the county court shall, at its next session, enter of record an order requiring the supervisors to attend on a day, and at a place designated in the order, to carry out the wishes of the voters as expressed at the election."

May it here be asked: who *decides* that the report of the board of commissioners sets forth "the wishes of the voters as expressed at the election?" Is it the judgment of the court, or the judgment of the Legislature? The Legislature has

plainly stripped the court of all judicial discretion, and has, by its own enactment, *decided* that if the commissioners report in favor of subscription, the report necessarily expresses the wishes of the voters. This report is thus made conclusive evidence of its own statements, and the court is required to render a judgment dictated by the Legislature, not because, in the exercise of an unfettered judicial discretion, it has so determined, but because it appears from the report of the commissioners.

By reference to printed page 17 of the record, it will appear that the order made by the County Court in this case recites not that the court has decided, but that, "it appearing from the report of said commissioners." This reference of the matter to the court, even if notice and opportunity to be heard were given to the tax-payers, does not relieve section 63, or said special act, of any of the objectionable features already pointed out.

"In our opinion, this circuity of proceeding, however much it may disguise, does not alter the nature of the transaction. The question, in cases of this kind, is not whether the method by which the owner of property is deprived of it is direct or circuitous, but whether it is 'due process of law,' 'which means,' it has been said, 'due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.'"

Burke v. *M. S. Bank*, 12 R. I., 513.

"The constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, or, in other words, without a day in court and opportunity for being heard, obviously requires that questions of right be determined by the judicial department of government."

2 Hare's Am. Const. Law, 844.

In speaking of local taxation, which "should be based on an assessment, not made legislatively, but through some proceed-

ing in accordance with the immutable principle that no man shall be injured in his person or estate without a hearing," it is said: "Such taxation not only involves an inquiry into facts that cannot be duly ascertained without the production of witnesses and an argumentative consideration of their testimony that would seriously embarrass and delay legislation, but *transcends the legislative province* . . . and is *at variance with the constitutional distribution of the functions of government* among its several branches. This is the more true because the *existence of the power* depends in such cases upon a *preliminary inquiry*. . . . The question was ably considered and placed on what would seem to be the true basis in the case of *Stewart* v. *Palmer*, 74 N. Y., 188."

1 Hare's Am. Const. Law, 213–14.

Mr. Webster, in his argument of the Dartmouth College case in this court, urging a similar objection to the New Hampshire statutes, said: "By these acts the Legislature assumes to exercise judicial power. It declares a forfeiture . . . without *trial or hearing*. If the Constitution be not altogether waste-paper, it has restrained the powers of the Legislature in these particulars. If it has any meaning, it is that the Legislature shall pass no act directly and manifestly impairing private property and private privileges. It shall not *judge* by act. It shall not *decide* by act. It shall not *deprive* by act. But it shall leave all these things to be tried and adjudged by the law of the land."

In the case of *Savannah, F. & W. R'y Co.* v. *Geiger*, 21 Fla., 669, the Supreme Court of Florida said, in reference to an act of the Legislature of that State which made the affidavit of the owner *conclusive* of the amount of damages against railway companies for killing stock: "The Legislature cannot *create judgments*, even as to the single element of the amount of damages, upon the basis of an *ex parte* affidavit."

In the case *In re Splane*, 16 Atl. Rep., 481, an act of Pennsylvania which undertook to make it imperative upon the courts to admit an attorney to practice who filed a certificate of the presiding judge of the county from which he came to the effect that he is of reputable professional standing, etc., was held to be "an assumption of judicial power and unconstitutional," it being "a judicial, not a ministerial act," to admit an attorney.

In Blackwell on Tax Titles (5th ed.), § 847, it is said: "The Legislature cannot *constitutionally* declare a tax deed conclusive evidence of a material fact, upon the existence of which the power to sell and convey depends." . . . A legislative attempt to make the deed *conclusive* evidence . . . is *unconstitutional*."

See also *In re Lake*, 3 So. Rep., 579.
Strode v. *Washer*, 16 Pac., 926.
Immegart v. *Gorgas*, 41 Iowa, 439.
Davis v. *Vanarsdale*, 59 Miss., 367.
Marx v. *Hawthorn*, 30 Fed., 579.
Bannon v. *Burnes*, 39 Fed., 892.

TAXATION.

The court will observe that the immediate result of the order of the County Court is the subscription by the board of supervisors (see record, page 17,) and the delivery of county bonds to the railway company. In the recent case of *Supervisors of Cumberland County* v. *Randolph*, 17 Va. Law Journal, 93–99, § 1248 of the Code of Virginia of 1887 (the same provision is contained in § 66 of chapter 61 of the Code of 1873), is held to require the board of supervisors to levy a tax to pay such bonds, as a ministerial duty about which the supervisors have no discretion. It is also held that holders of these bonds before maturity are presumed to be *bona fide* holders unless *fraud* or *illegality* in the inception of the bonds be shown, and no other

defense can be made. Lewis, P. speaking of the preliminary proceedings, such as a popular election, on which the authority to issue the bonds depends, and the action of the officers whose duty it is to ascertain these preliminary requisites, says: "In such case the recital is itself a *decision* of the fact by the appointed tribunal, and *estops* the corporation as against such holder to contest it. . . . . Its (the board of supervisors') duty in the matter was clear and purely ministerial, viz: to levy a tax to pay them as § 1248 of the Code requires."

The Court of Appeals thus recognizes that the action of the board of commissioners and officers charged with the ascertainment of the preliminary requisites, is *judicial*, otherwise it could not be said that the "recital is itself a decision by the appointed tribunal."

The contention for the plaintiffs in error is that before this "appointed tribunal" can constitutionally render this "decision," subjecting them, as tax-payers of the county, to the taxation, they must have notice and a hearing.

The decision is in effect a judgment against them; the tax bill is an execution, and, as said by Mr. Justice Field, "whether it takes property directly, or creates a *charge* or *liability* which may be the *basis of taking it*, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of 'due process of law.'"

Railroad Tax Case, 13 Fed., 723.

Act of January 15, 1875.

It is true that, by the act approved January 15, 1875, (Session Acts 1874–'75, page 29), it is provided that "the returns of said election, or decision of the voters, shall be subject to the enquiry, determination, and judgment of the court of the county . . . upon the written complaint of fifteen or more

of the qualified voters of the county of an undue election or false returns," which must be filed within thirty days after the election. But this act does not cure the defects, for the following reasons:

1. Because this act was not passed at the time of and as a part of these sections of the Code. It was passed long after. The character and validity of these sections of the Code were fixed at the time of their enactment. And if, for the reasons stated, they were void, they are mere nullities, *ab initio*. The passage of this act did not give them life. Their status as nullities remained unchanged.

2. Because it provides *no notice*. There must be some kind of notice by some mode of publication. No notice is in any way given by the statute. The act only prescribes the length of time after the election within which the complaint be made. And the election, being a special one, may be held "at any time" named by the county court. So that the law affords no notice of the action of the board of commissioners, and no notice of the predency of the report in the county court."

" Notice is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause."

Cooley Const. Lim. (6th ed.), 496, *n.* 2.

" I am of opinion that the Constitution sanctions no law imposing such assessment without a notice to and a hearing by the owners of the property to be assessed. It is not enough that the owners may by *chance* have notice. The law must require notice, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what *may by its authority* be done."

Eearl, J., in *Stuart* v. *Palmer*, *supra*.

"If such a right (the right to notice) and opportunity to be heard is an essential element of 'due process of law,' the law must provide for it *as a right*. The party is not required to accept it as a boon by the favor or good nature of the officers."

Sawyer, J., in *Santa Clara County* v. *So. Pacific R'y Co.*, 18 Fed., 429.

See also *Boggs* v. *The Commonwealth*, 76 Va., 1000, in which Judge Staples said: "If the petitioners had notice, it was *accidental*, and not through any legal notification *provided by the statute*. . . . This very point arose in Hibbard v. The People, 4 Mich., 125. The court in commenting upon it, used the following language: 'It is said that the proceedings under the liquor law may be so conducted consistently with its provisions as to secure to the person whose property is seized all his constitutional rights. If this is possible, that is not enough. The law must afford to the accused the means of demanding and enforcing his constitutional rights, and, if it authorizes a course of procedure which would deprive him of this, it is void.'"

3. Because the privilege of being heard, even upon the legality of the *election* and *returns*, is expressly limited to *fifteen or more qualified voters*, instead of being given to *all* of the *tax-payers* of the county. However fraudulent may be the election, and however false may be the returns, the act only opens the doors of the court to qualified voters, and to them only, upon condition that "fifteen or more" join in the complaint. The right to be heard, under any circumstances whatever, is, by the provisions of this act, absolutely denied to all other property-owners of the county, together with fourteen qualified voters, just as, by the provisions of the Code, it is denied to *all* the property-owners and tax-payers, whether qualified voters or not. By the laws of this State women, whether married or *sole*, may acquire and hold taxable property of all kinds. So also may men who, for the various causes of disability and

disfranchisement, are not qualified voters. So also may children and persons under any disability whatever. And all these persons, either in their own persons or by their guardians, committees, or proper representatives, are entitled to all the privileges of litigation for the protection of their property which may be exercised by qualified voters. The government, by the exercise of the right of eminent domain, cannot touch the property of persons, even under disabilities to sue in their own rights, without affording to them a hearing in the proper form and by the proper persons. See Mills on Eminent Domain (2d ed.) § 72, *et seq.*, a principle fully recognized in our Code. (See Code of 1887, § 1075.) And the clause of the fourteenth amendment of the United States Constitution forbidding the States to deprive *any person* of life, liberty, or property without "due process of law," or "deny to *any person* within to their jurisdiction the equal protection of the laws," is not a guaranty to *qualified voters* alone, *if fifteen or more* join in a complaint. To hold otherwise would be to make the Constitution say to the States: "You shall not deprive *any person* of life, liberty, or property without due process of law, unles he is not a qualified voter, and even qualified voters shall not be protected, unless fifteen or more complain."

The Legislature cannot make a dichotomy of the property-owners into voters and non-voters, and deny to the non-voters the right to defend their rights of property. The constitutional guaranty protects every *person*, native or alien, good or bad, old or young, rich or poor, singly or collectively, male or female, natural or artificial.

Santa Clara County v. *So. Pacif. R'y Co.*, 18 Fed., 385.
Same v. *Same*, 118 U. S., 394.
L. & N. R. R. v. *Tenn. R. R. Com'n*, 19 Fed., 679.
Yick Wo v. *Hopkins*, 118 U. S., 356.
In Re Newport Charter, 14 R. I., 655.
Strander v. *West Virginia*, 100 U. S., 303; Id., 315; Id., 339.
Neal v. *Delaware*, 103 U. S., 370.
Pearson v. *Portland*, 69 Me., 278.

The right to *vote* is a *political* right *in* the government which the States can confer upon such persons as they may determine within certain limits; but the right to *sue* for the protection of the rights of life, liberty, and property is a *civil* right *under* the government, which cannot be given to some and withheld from others. By virtue of being *qualified voters* the qualified voters determine the propriety of authorizing the subscription, but by virtue of being *property-owners*, all of the property-owners of the county are entitled to be heard on the question whether or not the qualified voters have authorized the subscription. A vote in favor of subscription entails upon the property-owners of the county the burden of paying the public debt thereby incurred, which debt is to be collected in the summary manner provided for the collection of taxes, without notice and without hearing. On the question, therefore, whether the requisite vote was cast in favor of subscription, *each tax-payer*, regardless of his qualification as voter, is entitled to be heard. In consequence of this vote, the property of the tax-payers will be taken and transferred to the holders of the county bonds; but before there can be such taking, there must be an opportunity to be heard given to all the tax-payers. The tax to be levied is not a tax which the Legislature has *absolutely* empowered the county to levy. It is a tax which will be levied to discharge a debt growing out of a private contract between the county and the railroad company, which contract the Legislature has *conditionally* empowered the county to enter into. To ascertain whether the *condition* precedent has been performed, judicial action is necessary, and every tax-payer is entitled to notice and an opportunity to be heard before the board or tribunal which performs this judicial function.

4. Because the act only purports to make the *returns* of the election or decision of the voters subject to the enquiry, judgment, and determination of the court of the county, it does not make the *report of the board of commissioners* subject to such

inquiry, determination, and judgment. "If it shall appear by the report of the board of commissioners, . . . the county court *shall*," etc. This is the legislative mandate to the court. According to the statute over this report, neither the tax-payer nor the court can exercise the slightest control. It is insisted that the statute, in order to provide due process of law, and to avoid being a legislative assumption of judicial power, ought to provide that after the report has been entered upon the order-book of the court, an order shall be entered directing the tax-payers to show cause, if any they can, against the confirmation of the report; and if no sufficient cause be shown, that the order to the supervisors be entered, leaving to the court full discretion in passing upon the sufficiency of the cause, and requiring the order directing the cause to be shown to be sufficiently promulgated by some mode of publication to apprise the tax-payers of their opportunity to be heard. The Legislature cannot, without invading the province of the court, assume that the report of the board of commissioners "expresses the wishes of the voters." This is a matter for the court to determine, *ex mero motu*, if necessary or upon a full hearing of the railroad company and the tax-payers. Suppose the court should perceive, or have good reason to believe, that the report of the commissioners was false or fraudulent, and all the non-voting tax-payers and fourteen qualified voters should object to the adoption of the report, still, according to the statute, the court would be powerless, and would be compelled to sanction a fraud, because the statute only gives the court jurisdiction to inquire into the *election* and the *returns*, and into these only, upon "complaint of fifteen or more qualified voters." It is believed that no other single instance can be cited in which a court is required to adopt and confirm a report of its commissioners without extending to parties interested the right to except and be heard and without the power to exercise any judicial discretion in reference to its adoption and confirmation.

This report of the board of commissioners is not the *election* and not the *return*. Yet the complaint must allege an *undue election* or *false return*, otherwise this act does not authorize it to be made. It may be that the *election* is proper and the *return* is true, yet the report of the commissioners may be erroneous, through mistake or fraud. Section 63 contemplates a variance between the report and the return, for it authorizes the commissioners to "correct the return if needed." Who can assume the correctness of the commissioners' corrections? But besides "counting the ballots and correcting the return" the commissioners have to ascertain and *report* whether "three-fifths of the qualified voters of the county voting at said election are in favor of subscription" and whether "said three-fifths include a majority of votes cast by free-holders and a majority of the registered voters of the county." In the discharge of this duty there is ample room for honest errors and also for frauds. As to how the commissioners discharge this duty there is no possibility under the statutes for either the court or the tax-payers, whether voters or not, to inquire or to ascertain.

DENIAL OF EQUAL PROTECTION OF THE LAWS.

5. Because this act, if it be regarded as standing alone in its imperfection, or the whole system of laws for the subscription by municipal corporations to the stock of internal improvement companies, if it be regarded as an inseparable portion of that system, is repugnant to the first clause of the fourteenth amendment of the United States Constitution, which forbids the States "to deny to any person within their jurisdiction the equal protection of the laws," and, therefore, void.

The laws of Virginia, the court will observe, only authorize "fifteen or more qualified voters" to make any resistance to a proceeding to saddle the property-owners of a county with gigantic debts of this kind. All the other property-owners are denied a hearing in the courts. They must submit to any

amount of fraud and outrage, because the Legislature has shut the doors of the courts to their complaints. The ablest and most comprehensive authority on the clause of the Constitution relied on here to which I can refer the court is the case of *Santa Clara County* v. *The So. Pac. R'y Co.*, 18 Fed., 385. In this case opinions are delivered by Mr. Justice Field, presiding on the circuit, and by Judge Sawyer. On page 397 Mr. Justice Field, after stating the language of the amendment and declaring its extensive operation beyond the mere protection of the enfranchised race, says: "Oppression of the person and spoliation of the property by any State were thus forbidden, and equality before the law secured to all. In the argument of the *San Mateo Case*, in the Supreme Court, Mr. Edmunds, who was a member of the Senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: There was no word in it that did not undergo the completest scrutiny. There was no word in it that was not scanned and intended to mean the full and beneficent thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered. And the purpose of this long and anxious consideration was that protection against wrong and oppression should be made forever secure. To use his language: Secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending on their local tribunals for its efficient exercise, but secure, as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States, and the whole body of the people.

"With the adoption of the amendment the power of the States to oppress under any form was forever ended; and henceforth *all persons* within their jurisdiction could claim equal protection of the laws. And by equal protection is meant *equal security* to *every one* in his *private rights*—in his right to

life, to liberty, *to property*, and to the pursuit of happiness. It implies not only that the *means which the law affords for such security* shall be *equally accessible* to all, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to any religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—shall touch the life, liberty, or property of *any person*, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws. . . . The amendment is aimed against the perpetration of injustice and the exercise of arbitrary power to that end. The position that *unequal taxation* is not within the scope of the prohibitory clause would give to it a singular meaning. . . . It would, indeed, as counsel in the *San Mateo Case* ironically observed, be a charming spectacle to present to the civilized world if the amendment were to read, as contended it does, in law: 'Nor shall any State deprive any person of his property without due process of law, except it be in form of *taxation*, nor deny to any person within its jurisdiction the equal protection of the laws, except it be by taxation. No such limitation can thus be engrafted on the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws." "On page 429 of the same

case Judge Sawyer said: "In the forcible and accurate language of Mr. Edmunds, which I cannot improve: 'The fourteenth amendment was a new Magna Charta that was, in fact, in form and effect a fundamental security to every person in the State in respect to *every private right* that could be invaded, and an absolute affirmation of equality of *civil* rights to all persons before the law. The first clause forbids the State to touch life, liberty, or property without due process of law; and the second forbids that, even with due process of law, any person shall be denied the equal protection of the laws. This is the plain letter of the amendment. It is its intrinsic and beneficent spirit, and it was its purpose. . . . What, then, is equality of protection? A *civil* right *under* a government is a distinct thing from a *political* right *in it*. Thus a State may deny to females the right to vote, but it cannot deny to them the *right to sue in courts*. . . . To hold otherwise would lead to the affirmation of the right of the State to make race, or color, or religion, or *age*, or stature the criterion of *civil* rights, and to exert the absolute right of confiscation by classes or descriptions [which I contend is done by the act in question denying to property-owners who are not qualified voters the right to sue], for in such a case every person of that class or description would stand on an equality with his fellow-victims.'

"It is not denied that a State may classify the persons who are to perform certain public duties, or bear certain public burdens, based upon personal peculiarities of either sex or calling, etc., as to require military service only from males, or to exempt females from a poll-tax, and impose a license-tax upon certain trades, or tax all franchises or corporations and their special privileges; but it could not impose a poll-tax on one-half its male and female citizens that it did not impose on the rest in like degree. And when we come to the case of property as property, to be affected by a tax, or any other imposition imposed upon it as a thing of value, a distinction cannot be made to depend upon *character* or *occupation* or *quality*,

or *any individual characteristics* of the citizen. To hold otherwise would be to set up the very essence of tyranny and arbitrary power.

"Equal protection is the same protection under the same circumstances; all are to stand alike in like intrinsic conditions. Holding property as property is certainly a like intrinsic condition. In the administration of justice, if the criterion of a right to sue be value, all must have the same right when the same value is concerned; or if the criterion be the nature of the controversy, all must have the same right *whose causes are of the same nature.* This appears to be too clear for discussion.

"So, too, in the matter of taxation. If the tax, as in this case, be laid upon the value of property, all persons must stand on the same footing . . . without reference to what particular characteristics as citizens or persons they may have as *sex*, or race, or *age*, or *quality*, or calling. The basis of the imposition being property as such, the fact that certain property is owned by a corporation, or a white man, or a man of bad character, or a clergyman, cannot be made the ground of a levy that both in form, in fact, and in result is unequal and injurious. Any other doctrine necessarily implies that the State may carry such unequal exactions to the end of complete confiscation by edict of all the property of any class or man, who, during the passion of the hour, may not be in the sunshine of popularity." (See also notes of editor, pages 449–'50–'51–'52 and '53.)

See also Cooley Cons. Lim., (3d ed.), 391–'92.
Lewis v. *Webb*, 3 Greenl., 326.
Durham v. *Lewiston*, 4 Greenl., 140.
Holden v. *James*, 11 Mass., 396.
Picquet, Appellant, &c., 5 Pick., 65.
Budd v. *State*, 3 Humph., 483.
Walley's Heirs v. *Kennedy*, 2 Yerg., 554.
Officer v. *Young*, 5 Yerg., 220.
Arnold v. *Kelly*, 5 W. Va., 446.

The taxation resulting from this election being a mode of deprivation of property, I submit that the criterion of the right to contest the election is the ownership of property, and that the act is void by reason of the discrimination against the non-voting property-owners.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S., 367, the court said that the fourteenth amendment undoubtedly intended "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons be equally entitled to pursue their happiness and acquire and enjoy property; that they should have *like access to the courts of the country* for the protection of their persons and property, the prevention and redress of wrongs. . . . Class legislation; discriminating against some and favoring others, is prohibited."

There can be no question of the right of the appellants to insist upon this objection, as well as any other that may be raised by any tax-payer, since this suit is for the benefit of all the tax-payers, and all the tax-payers of the county will be estopped by the decision in it.

2 Black on Judg., sec. 584.

CIVIL AND POLITICAL RIGHTS.

If it be incumbent on the appellants to suggest a reason which induced the Legislature to enact laws as arbitrary as those hitherto discussed, the following reason is submitted:

By reference to § 9 of chapter 10 of the Code of Virginia of 1873, it will be found that there is a provision for the contest of *elections of officers* by "fifteen or more qualified voters."

The act of January 15, 1875, appears to be a copy almost *in totidem verbis* of this section of the Code. And it is obvious that the Legislature has attempted to assimilate the *civil* right of property to the *political* rights involved in contests of elections of officers, and overlooked the distinction between the civil

right of every person to hold property secure from deprivation except by due process of law, and the political interest which the people have in the determination of what persons may or may not be elected to offices.

"Political rights are 'those which may be exercised in the formation or administration of the government.'"

Black's Law Dict., 909.

Elections of officers, therefore, are purely *political* matters of which courts have no *inherent* jurisdiction. The Legislature, in the exercise of the political powers of government, may make *no* provision for contesting elections of officers, or may provide for contests in the courts upon such arbitrary terms as it may prescribe.

Civil rights are "rights capable of being enforced or redressed in a civil action."

Black's Law Dict., 208.

It is the *special* province of the courts to maintain and protect civil rights. They alone are guarded by the *lex terrae* of Magna Charta and the "due process of law" of American constitutions.

The Legislature, therefore, under the *form* of an *election*, cannot invade the individual's right of property, without conforming to the requirements of "due process of law."

I would not be understood as asserting that it is improper to submit the question of subscription to voters only. This is proper. My contention is that if the ascertainment of the result of the election involves judicial inquiries each *tax-payer*, as such, is entitled to participate in the inquiry and to make defence to the taxation consequent upon the result of the election.

It is well settled that courts of equity have no inherent jurisdiction in contests of political elections.

But in election for the purpose of *taxation*, "*any tax-payer* of a municipal corporation may bring a bill in equity."

1 Wood's Ry. Laws, 332 § 131 and cases cited.

The distinction which I have endeavored to make here is recognized by the Supreme Court of Tennessee in the case of *Winston* v. *Tenn. and Pacific R. R. Co.*, 1 Jere Baxter, 60, 67. In the syllabus it is said: "Where a county court submits the question of subscription of stock to a railroad company to a vote of the people, the question whether it was submitted in pursuance of law, or, in other words, whether the county court, under the circumstances, had authority to submit it, is a question *not in the nature of a contested election between candidates for office.*" "When the question of the obligation of a contract of subscription is to be settled because of want of authority on the part of the county to make it, *for want of proper assent on the part of the people of the county*, the question of the result of what is, *by accommodation in the use of terms*, called an *election*, must be investigated, not under the idea of contesting an election, but for the purpose of ascertaining whether the contract of subscription made has been authorized according to law, and so binding on the county. In this view of the question it will be seen that it is not a question of contesting an election brought into a court of Chancery, but the question of the validity and obligation of a contract which by the law is made to depend on the assent of the majority of votes given at the ballot-box as a condition to its being made, and that the result and validity of the election are to be ascertained, in order to determine the question whether a binding contract has been made as to the corporation or county."

See also *Chestnutwood* v. *Hood*, 88 Ill., 132–136.

The position I insist upon, from the principle underlying the foregoing decisions, is that as "the result and validity of the election are to be ascertained in order to determine the question whether a binding contract has been made," a judicial inquiry is necessary, and that all persons who are to be affected by the tax are equally entitled to be heard in their defense according to those principles which constitute due process of law, and not according to the arbitrary political provisions which

constitute the ordinary "election machinery," and the statutes must provide for such hearing before the tax becomes effectual.

IF STATUTES ARE VOID.

If the foregoing statutes are unconstitutional the subscription and bonds are void, whether the bonds are in hands of the railway company or other persons.

Cole v. *LaGrange*, 113 U. S., 1.
Northern Bank v. *Porter Township*, 110 U. S. 608.
Dixon v. *Field*, 111 U. S. 83.
School District v. *Stone*, 106 U. S., 183.
Parkersburg v. *Brown*, 106 U. S., 487.
Hayes v. *Holly Springs*, 114 U. S., 120.
Cooley's Const. Lim. (6 ed.), 271, notes.
1 Wood's R'y Laws, §101.
Ryan v. *Lynch*, 68 Ill., 160.
Kelly v. *Milan*, 127 U. S., 139.
Norton v. *Dyersburg*, 127 U. S., 160.
Lake County v. *Graham*, 130 U. S., 662.
Wells v. *Pontiac County*, 102 U. S., 625.
Marsh v. *Supervisors of Fulton County*, 10 Wall, 677.
Ottoway v. *Carey*, 108 U. S., 110.
Daviers County v. *Dickinson*, 117 U. S., 657.
Bissell v. *Kanakee*, 64 Ill., 249.
People v. *Hamill*, 17 N. E. Rep., 799.
Williams v. *Roberts*, 88 Ill., 11.

It will be observed that on printed page 39, section 21 of Amended and Supplemental Bill, the questions argued above were presented to the court below, and the statutes herein discussed are charged to be unconstitutional and void. Their consideration and judgment upon their validity is humbly requested, and these, our remarks thereon, are respectfully submitted.

E. P. BUFORD,
Of Counsel for Appellants.